123-215

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~330~~ ~~85~~ 8

THE STATE OF MISSOURI WHO SUES AT THE RELATION AND TO THE USE OF GEORGE W. HARSHMAN, PLAINTIFF IN ERROR,

vs.

JOHN WINTERBOTTOM, PHILIP B. LINVILLE, JACOB PUGH, J. F. BIGGERSTAFF, JAMES CODY, F. M. GIFFORD, ELIAS V. WILSON, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 330.

THE STATE OF MISSOURI WHO SUES AT THE RELATION AND TO THE USE OF GEORGE W. HARSHMAN, PLAINTIFF IN ERROR,

vs.

JOHN WINTERBOTTOM, PHILIP B. LINVILLE, JACOB PUGH, J. F. BIGGERSTAFF, JAMES CODY, F. M. GIFFORD, ELIAS V. WILSON, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	2	1
Citation	3	2
Waiver, service, and citation	4	2
Amended petition	5	3
Demurrer to amended petition	13	7
Record entry of filing of and petition	15	8
Demurrer	15	8
Order sustaining demurrer	15	8
Judgment ordered	15	8
Judgment	16	8
Writ of error, citation and bond presented and approved	16	8
Bond	17	9
Clerk's certificate	18	10

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1883, thereof, between the State of Missouri, who sues at the relation and to the use of George W. Harshman, plaintiff, and John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, John McGennis, Geo. Taylor, Thomas Burk, and Thomas Bresner, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Issued at office in the city of Missouri, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.
By ——— ———, *Deputy.*

Allowed by—

SAMUEL TREAT, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the

seal of said circuit court, at office in the city of St. Louis, this 15th day of August, A. D. 1883.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court.

[Endorsed:] No. 2087. United States circuit court, eastern district of Missouri. State of Missouri, *ex rel.* George W. Harshman, *vs.* John Winterbottom *et al.* Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 15th day of August, 1883. A. P. Selby, clerk.

3 The United States of America to John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, John McGennis, George Taylor, Thomas Burk, and Thomas Bresner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the State of Missouri, who sues at the relation and to the use of George W. Harshman, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri this 26th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

4 Formal service of this citation is hereby waived by the within-named and cited defendants in error.

DRYDEN & DRYDEN,
For the Defendants in Error.

St. Louis, Aug. 18th, 1883.

[Endorsed:] No. 2087. United States circuit court, eastern district of Missouri. State of Missouri, *ex rel.* George W. Harshman, *vs.* John Winterbottom *et al.* Citation. Filed Aug. 20th, 1883. A. P. Selby, clerk.

5 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

Be it remembered that on June 13th, 1883, there was filed in the office of the clerk of said court a certain amended petition, which said amended petition is in words and figures following, to wit:

Amended Petition.

UNTED STATES OF AMERICA, *Eastern District of Missouri:*

THE STATE OF MISSOURI, at the relation and to the use of GEORGE W. HARSHMAN, Plaintiff,

vs.

JOHN WINTERBOTTOM *et al.*, *Defendants.*

The State of Missouri, who sues at the relation and to the use of George W. Harshman for her amended petition, states that the said Harshman is a citizen of the State of Ohio, and that the defendants are citizens of the State of Missouri; that on the 31st day of March, 1877, the said Harshman recovered in this court a judgment against the county of Knox, in the State of Missouri, for the sum of three thousand two hundred and fifty-eight dollars and fifteen cents and costs; that on the 18th day of October, 1877, said Harshman recovered in this court a further judgment against the said county for the sum of six thousand seven hundred and sixty-four dollars and forty-four cents and costs; that both of said judgments bear interest at the rate of six per cent. per annum; that afterwards, to wit, on the 8th day of February, 1878, said Harshman presented to this court
6 his information for a writ of mandamus, setting forth that said judgments were severally recovered on bonds issued by said county to the Missouri and Mississippi Railroad Company under and pursuant to the charter of said company, being an act entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865; that said charter provided for a special levy of taxes at the rate of one-twentieth of one per cent. per annum to pay the said bonds and the interest thereon, and that said levy had been made from year to year and was exhausted in the payment of other obligations of said county issued under the same charter, and that said levy was wholly inadequate to pay the judgments of relator or any part thereof, and praying for a writ of mandamus requiring the county court of said county to cause to be issued to said Harshman warrants for the said judgments, with interest and costs, payable out of the ordinary revenues of said county.

Plaintiff further states that such steps were taken upon such information that on the 21st day of March, 1878, a peremptory writ of mandamus was ordered by this court in accordance with the prayer of said information; that said writ was accordingly issued and served, and on the 15th day of March, 1879, the said county court, in compliance therewith, caused two warrants to be issued, both drawn upon the ordinary revenue fund of said county, one for the sum of three thousand three hundred and fifteen dollars and five cents, with interest on three thousand two hundred and fifty-eight dollars and fifteen cents at six per cent. per annum from March 31st, 1877, and one for the sum of six thousand eight hundred and
7 twenty-one dollars and seventy-four cents, with interest on six thousand seven hundred and sixty-four dollars and forty-four cents at six per cent. per annum from October 18th, 1877;

that both of said warrants were on the 18th day of March, 1879, presented to the treasurer of said county for payment, and payment thereof was refused because there was no money in the treasury of said county out of which the same could be paid, and the said treasurer so certified on the back of said warrants, and caused the said warrants to be entered in his registry of warrants, as required by section 5370 of the Revised Statutes of Missouri, and that no part of said warrants or either of them has yet been paid.

Plaintiff further states that the aggregate valuation of all the property in said county for purposes of taxation is less than six millions of dollars; that the county court of said county is authorized by the constitution of the State of Missouri to levy a tax each year for county purposes not exceeding fifty cents on every one hundred dollars; that the ordinary revenues of said county consist of the proceeds of such tax, and that said Harshman is by law entitled to have his said warrants paid out of said revenues.

Plaintiff further states that in each of the years 1879 and 1880 the said county court levied the said tax of fifty cents on every one hundred dollars for county purposes; that such levy, if the tax had been faithfully collected and paid into the treasury of said county, would have yielded about thirteen thousand five hundred dollars per annum; that the warrants of said Harshman were presented to the treasurer of said county, and were protested for non-payment,
8 and registered, as above stated, before any other warrants which were outstanding in said county between the 18th day of March, 1879, and the 1st day of March, 1881, and were entitled to be paid first out of the county revenues, and would have been paid in full if the said county taxes had been collected and paid into the treasury of said county as required by law.

Plaintiff further states that on the 5th day of November, 1878, defendant Winterbottom was elected to the office of collector of the revenue of said county, and was duly commissioned as such collector; that on the 30th day of December, 1878, said Winterbottom, as principal, and the other defendants as sureties executed a bond whereby they acknowledged themselves to be held and firmly bound unto the State of Missouri in the sum of one hundred thousand dollars, for the payment of which they bound themselves, their heirs, executors, and administrators; that said bond was conditioned that said Winterbottom should faithfully and punctually collect and pay over all State, county, and other revenue for two years next ensuing the first day of March, 1879, and should in all things faithfully perform all the duties of the said office of collector according to law, and that said bond was, on the day last aforesaid, approved by the said county court.

Plaintiff further states that by law it was the duty of said Winterbottom as such collector to collect all county taxes of said county in money, except that he was authorized and required to receive any county warrants issued by said county when presented to him by the legal holder thereof in payment of any county tax existing against said
9 holder and accruing to said county; that he was not required or authorized to receive any such warrant from any one other

than the legal holder thereof, and not from such holder except in payment of a county tax assessed against him; that the legal holder of a county warrant is the person to whom the same is issued as payer, or to whom the same has been transferred by one or more assignments in full; that by law all county warrants must be made payable to a person therein named, and no county warrant can be made payable to bearer, and any county warrant payable to bearer is null and void.

For breach of the aforesaid bond plaintiff states that the said Winterbottom, in disregard of his duty as such collector, and unlawfully and wrongfully contriving and intending to prevent any money from coming into the treasury of said county, and to prevent the said Harshman from collecting or receiving from the said county any money upon account or in payment of his said warrants, did, during his said term of office, unlawfully and wrongfully receive from divers and sundry persons, in payment of taxes of said county, divers and sundry warrants of said county, the said persons not being the legal holders thereof, because the said warrants were in no case payable to such persons and were in no case transferred to such persons by assignment in full, and said persons, not being entitled to pay the same in for taxes, because no taxes were assessed or existing against them; that said Winterbottom, upon receiving such warrants, gave receipts discharging from further pay-
10 ment the persons against whom said taxes were so assessed and existing, to an amount equal in each case to the amount of warrants so received; that from the 18th day of March, 1879, to the 1st day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as aforesaid, and not otherwise; that all the tax-payers of said county from whom any county taxes were due during said period have received from said Winterbottom full acquitttances without the payment of any money and without any payment except in warrants as aforesaid:

Plaintiff further states that the said Winterbottom as required by law, once in each month during the said period made settlements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of said county the said warrants so received as aforesaid; that the said Winterbottom, as such collector, and the said treasurer at various times during the years 1879, 1880, and 1881 made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court and filed with the clerk of said court all the county warrants so received by the said collector, and by him delivered to the said treasurer, and the said county court accepted and approved the settlements of the said collector and the said treasurer, and approved the acts of the said collector in receiving warrants in payment of taxes as aforesaid, and ratified and
11 confirmed the release and discharge of said taxpayers from payment of their taxes as aforesaid, so that the same cannot again be demanded of them.

Plaintiff states that by the means aforesaid the said Winterbottom has unlawfully and wrongfully prevented any money from coming

into the treasury of said county, in consequence whereof said Harshman has been unable to obtain payment of his said warrants, and that his acts so done as aforesaid have been done with the unlawful and fraudulent purpose of defeating the collection and preventing the payment of said Harshman's warrants, and have defeated their collection and prevented their payment.

For further breach of the aforesaid bond plaintiff states that the said Winterbottom, in disregard of his duty as such collector, and unlawfully and wrongfully contriving and intending to prevent any money from coming into the treasury of said county, and to prevent the said Harshman from collecting or receiving from the said county any money upon account or in payment of his said warrants, did, during his said term of office, unlawfully and wrongfully receive in payment of taxes of said county divers and sundry warrants of said county; that said warrants had, before they were so received for taxes, been issued by order of the said county court for work and labor done, and services rendered and materials furnished to, said county, but the same were payable to bearer; that upon so receiving said warrants said Winterbottom gave receipts, discharging
12 from further payment the persons against whom said taxes were so assessed and existing to an amount equal in each case to the amount of warrants so received; that from the 18th day of March, 1879, to the 1st day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as last aforesaid, and not otherwise; that all the tax-payers of said county from whom any county taxes were due during said period have received from said Winterbottom full acquittances, without the payment of any money, and without any payment, except as warrants, as last aforesaid.

Plaintiff further states that the said Winterbottom, as required by law, once in each month during the said period made statements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of said county the said warrants so received as aforesaid; that the said Winterbottom, as such collector, and the said treasurer, at various times during the years 1879, 1880, and 1881, made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court and filed with the clerk of said court all the county warrants so received by the said collector and by him delivered to the said treasurer, and the said county court accepted and approved the settlements of the said collector and the said treasurer, and approved the acts of the said collector in receiving warrants in payment of taxes as aforesaid, and ratified and con-
13 firmed the release and discharge of said tax-payers from payment of their taxes as aforesaid, so that the same cannot again be demanded of them.

Plaintiff states that by the means aforesaid the said Winterbottom has unlawfully and wrongfully prevented any money from coming into the treasury of said county, in consequence whereof said Harshman has been unable to obtain payment of his said warrants, and that his acts so done as aforesaid have been done with the unlawful

and fraudulent purpose of defeating the collection and preventing the payment of said Harshman's warrants, and have defeated their collection and prevented their payment.

Plaintiff states that by reason of the several breaches of the said bond herein alleged the said Harshman is damaged in the sum of one hundred thousand dollars, for which sum, with the costs of this suit, plaintiff prays judgment.

T. K. SKINKER,
Attorney for Plaintiff.

And afterwards, to wit, on June 13th, 1883, there was filed the following demurrer to plaintiff's amended petition, to wit:

Demurrer to Amended Petition.

In the U. S. Circuit Court for the Eastern District of Missouri.
March Term, 1883.

THE STATE OF MISSOURI, Plaintiff, suing at the relation and to the use of George W. Harshman,
vs.
JOHN WINTERBOTTOM and Others, Defendants. } No. 2087.

14 The said defendants, by Dryden and Dryden, their attorneys, come and demur to the plaintiff's amended petition herein this day filed, and say that said amended petition is insufficient in law to charge the defendants, and for cause of demurrer they assign the following:

1. Said amended petition does not state facts sufficient to constitute a cause of action.

2. Upon the facts stated in said amended petition the defendants are not answerable in this action or in any action at law brought by the plaintiff at the relation of the said George W. Harshman, relator, on their said bond.

3. The misfeasances and misconduct of the defendant Winterbottom complained of in the said amended petition are wrongs done to the county of Knox, for which the county has the exclusive right to sue at law, and yet it does not appear in or by the said amended petition that said county has in any wise complained of said supposed wrongs, or has in any wise joined in or authorized this suit, or that this is in any sense the suit of the county of Knox.

4. The law does not imply damage to Harshman from the facts stated in the said amended petition, and the petition fails to show special damage to him, and so no cause of action is shown in favor of Harshman.

5th. The said Harshman has neither a legal nor an equitable title to sue; he has no legal title, because the wrongful acts complained of are wrongs to the county, which an action by the county would fully redress; he has no equitable title to sue, because it does not appear that the county has been in any wise requested to sue
15 or has refused to sue for the delinquencies complained of, or that any of the conditions exist which would give to Harshman the right to sue in equity.

6. Said amended petition is uncertain and insufficient in this, that it does not inform the defendants the names of the persons whose taxes, alluded to in the first breach, were unlawfully paid in warrants not belonging to them, nor the amounts of the taxes thus paid; nor does it inform the defendants the names of the tax-payers whose taxes, alluded to in the second breach, were paid in void warrants, nor the amounts of the taxes thus paid; and said amended petition is, in other respects, uncertain, vague, and contradictory, and the same should be ordered to be reformed and made certain and definite.

Wherefore defendants pray judgment, &c.

DRYDEN & DRYDEN,
Att'ys for Defendants.

And afterwards, to wit, on the same day, June 13th, 1883, the following further proceedings were had and appear of record in said cause, to wit:

Amended Petition Filed. Demurrer to Same Filed. Demurrer Sustained. Judgment Ordered for Defendants.

STATE OF MISSOURI, *ex rel.* GEORGE W. HARSHMAN, Plaintiff,
vs.
JOHN WINTERBOTTOM *et al.*, Defendants. } 2087.

Now comes the plaintiff, by attorney, and files amended petition, and also come the defendants, by attorneys, and file demurrer thereto; and the court having fully considered the same finds the law thereon for the defendants, and orders that said demurrer to amended petition be sustained, and that judgment be now entered herein for said defendants upon said demurrer.

16 It is, therefore, considered by the court that the plaintiff take nothing by its writ herein; that the defendants, John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, John McGennis, George Taylor, Thomas Burk, and Thomas Bresner, go hence without day and recover of the said plaintiff their costs in this behalf expended, and that a fee bill on execution issue therefor.

And afterwards, to wit, on June 26th, 1883, the following further proceedings were had in said cause, to wit:

Writ of Error, Citation, & Bond Presented & Approved.

STATE OF MISSOURI, *ex rel.* GEORGE W. HARSHMAN, Plaintiff,
vs.
JOHN WINTERBOTTOM *et al.*, Defendants. } 2087.

Now comes the plaintiff, by attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the defendants herein to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October next, which said writ

of error is allowed and said citation signed by the judge, and the said plaintiff also presents to the Court a bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as a part of the record herein.

Said bond is in words and figures as follows, to wit:

17 Know all men by these presents that we, George W. Harshman, as principal, and John M. Gilkeson, as surety, are held and firmly bound unto John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, John McGennis, George Taylor, Thomas Burk, and Thomas Bresner in the full and just sum of five hundred dollars, to be paid to the said John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, John McGennis, George Taylor, Thomas Burk, Thomas Bresner, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at the March term, A. D. 1883, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the State of Missouri, who sues at the relation and to the use of George W. Harshman, plaintiff, and the said Winterbottom, Linville, Pugh, Biggerstaff, Cody, Gifford, Wilson, McGennis, Taylor, Burk, & Bresner, are defendants, a judgment was rendered against the said State of Missouri, plaintiff as aforesaid, and the said plaintiff having obtained a writ of error of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if the said plaintiff fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

GEORGE W. HARSHMAN. [SEAL.]
By T. K. SKINKER, [SEAL.]
His Agent.
JNO. M. GILKESON. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

[Endorsed:] No. 2087. United States circuit court, eastern district of Missouri. State of Mo., *ex rel.* George W. Harshman, *vs* John Winterbottom *et al.* Bond, $500. —— ——, principal. —— ——, sureties. Filed 26 day of June, 1883. A. P. Selby, clerk.

18 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings had in case No. 2087 of State of Missouri, *ex rel.* George W. Harshman, plaintiff, against John Winterbottom, *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 11th day of September, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court,
By T. L. CRAWFORD, *Deputy.*

[Endorsed:] No. 2087. United States circuit court, eastern district of Missouri. State of Missouri, *ex rel.* George W. Harshman, against John Winterbottom *et al.* Duly-certified transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 330. The State of Missouri, who sues at the relation and to the use of George W. Harshman, plaintiff in error, *vs.* John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, *et al.* Filed 4th October, 1883.

E 3-215

Office Supreme Court U. S.
FILED.
OCT 10 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1887.

THE STATE OF MISSOURI EX REL. GEORGE W. HARSHMAN, *Plaintiff in Error*,

vs.

JOHN WINTERBOTTOM ET AL., *Defendants in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

T. K. SKINKER,
Of Counsel for Plaintiff in Error.

HERALD PUBLISHING HOUSE, COLUMBIA, MO.

18 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings had in case No. 2087 of State of Missouri, *ex rel.* George W. Harshman, plaintiff, against John Winterbottom, *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 11th day of September, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court,
By T. L. CRAWFORD, *Deputy.*

[Endorsed:] No. 2087. United States circuit court, eastern district of Missouri. State of Missouri, *ex rel.* George W. Harshman, against John Winterbottom *et al.* Duly-certified transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 330. The State of Missouri, who sues at the relation and to the use of George W. Harshman, plaintiff in error, *vs.* John Winterbottom, Philip B. Linville, Jacob Pugh, J. F. Biggerstaff, James Cody, F. M. Gifford, Elias V. Wilson, *et al.* Filed 4th October, 1883.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1887.

THE STATE OF MISSOURI EX REL. GEORGE W. HARSHMAN, *Plaintiff in Error*,

vs.

JOHN WINTERBOTTOM ET AL., *Defendants in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

T. K. SKINKER,
Of Counsel for Plaintiff in Error.

HERALD PUBLISHING HOUSE, COLUMBIA, MO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1887.

THE STATE OF MISSOURI EX REL. GEORGE W. HARSHMAN, *Plaintiff in Error*,

vs.

JOHN WINTERBOTTOM ET AL., *Defendants in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action brought against John Winterbottom, late collector of the revenue of Knox county, Missouri, and against the sureties in his official bond. Briefly stated, the petition charges that Winterbottom, in collecting the taxes of the county, unlawfully received warrants instead of exacting money from the taxpayers, in consequence of which no money came

into the treasury of the county, and that this was done for the purpose of preventing the collection of certain registered warrants held by the plaintiff, and had that effect. The case went off on demurrer to the petition.

The petition is as follows:

The State of Missouri, who sues at the relation and to the use of George W. Harshman, for her amended petition, states that the said Harshman is a citizen of the State of Ohio, and that the defendants are citizens of the State of Missouri; that on the thirty-first day of March, 1877, the said Harshman recovered in this court a judgment against the county of Knox, in the State of Missouri, for the sum of three thousand two hundred and fifty-eight dollars and fifteen cents and costs; that on the eighteenth day of October, 1877, said Harshman recovered in this court a further judgment against the said county for the sum of six thousand seven hundred and sixty-four dollars and forty-four cents and costs; that both of said judgments bear interest at the rate of six per cent. per annum; that afterwards, to-wit, on the eighth day of February, 1878, said Harshman presented to this court his information for a writ of mandamus, setting forth that said judgments were severally recovered on bonds issued by said county to the Missouri and Mississippi Railroad Company under and pursuant to the charter of said company, being an act entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865; that said charter provided for a special levy of taxes, at the rate of one-twentieth of one per cent. per annum to pay the said bonds, and the interest thereon, and that said levy had been made from year to year and was exhausted in the payment of other obligations of said county issued under the same charter, and that said levy was wholly inadequate to pay the judgments of relator or any part thereof, and

praying for a writ of mandamus requiring the county court of said county to cause to be issued to said Harshman warrants for the said judgments, with interest and costs, payable out of the ordinary revenue of said county.

Plaintiff further states that such steps were taken upon such information that on the twenty-first day of March, 1878, a peremptory writ of mandamus was ordered by this court, in accordance with the prayer of said information; that said writ was accordingly issued and served, and on the thirteenth day of March, 1879, the said county court, in compliance therewith, caused two warrants to be issued, both drawn upon the ordinary revenue fund of said county, one for the sum of three thousand three hundred and fifteen dollars and five cents, with interest on three thousand two hundred and fifty-eight dollars and fifteen cents at six per cent. per annum from March 31, 1877, and one for the sum of six thousand eight hundred and twenty-one dollars and seventy-four cents, with interest on six thousand seven hundred and sixty-four dollars and forty-four cents at six per cent. per annum from October 18, 1877; that both of said warrants were, on the eighteenth day of March, 1879, presented to the treasurer of said county for payment, and payment thereof was refused because there was no money in the treasury of said county out of which the same could be paid, and the said treasurer so certified on the back of said warrants, and caused the said warrants to be entered in his registry of warrants, as required by section 5370 of the Revised Statutes of Missouri, and that no part of said warrants or either of them has yet been paid.

Plaintiff further states that the aggregate valuation of all the property in said county for purposes of taxation is less than six millions of dollars; that the county court of said county is authorized by the constitution of

the State of Missouri to levy a tax each year for county purposes not exceeding fifty cents on every one hundred dollars; that the ordinary revenue of said county consists of the proceeds of such tax, and that said Harshman is by law entitled to have said warrants paid out of said revenue.

Plaintiff further states that in each of the years 1879 and 1880 the said county court levied the said tax of fifty cents on every one hundred dollars for county purposes; that such levy, if the tax had been faithfully collected and paid into the treasury of said county, would have yielded about thirteen thousand five hundred dollars per annum; that the warrants of said Harshman were presented to the treasurer of said county, and were protested for non-payment, and registered, as above stated, before any other warrants which were outstanding in said county between the eighteenth day of March, 1879, and the first day of March, 1881, and were entitled to be paid first out of the county revenues, and would have been paid in full if the said county taxes had been collected and paid into the treasury of said county as required by law.

Plaintiff further states that on the fifth day of November, 1878, defendant Winterbottom was elected to the office of collector of the revenue of said county, and was duly commissioned as such collector; that on the thirtieth day of December, 1878, said Winterbottom, as principal, and the other defendants as sureties, executed a bond whereby they acknowledged themselves to be held and firmly bound unto the State of Missouri in the sum of one hundred thousand dollars, for the payment of which they bound themselves, their heirs, executors and administrators; that said bond was conditioned that said Winterbottom should faithfully and punctually collect and pay over all state, county, and other revenue for two years next ensuing the first day of

March, 1879, and should in all things faithfully perform all the duties of said office of collector according to law, and that said bond was, on the day last aforesaid, approved by the said county court.

Plaintiff further states that by law it was the duty of said Winterbottom, as such collector, to collect all county taxes of said county in money, except that he was authorized and required to receive any county warrants issued by said county when presented to him by the legal holder thereof in payment of any county tax existing against said holder and accruing to said county; that he was not required or authorized to receive any such warrant from any one other than the legal holder thereof, and not from such holder except in payment of county tax assessed against him; that the legal holder of a county warrant is the person to whom the same is issued as payee, or to whom the same has been transferred by one or more assignments in full; that by law all county warrants must be made payable to a person therein named, and no county warrant can be made payable to bearer, and any county warrant payable to bearer is null and void. For breach of the aforesaid bond plaintiff states that the said Winterbottom, in disregard of his duty as such collector, and unlawfully and wrongfully contriving and intending to prevent any money from coming into the treasury of said county, and to prevent the said Harshman from collecting or receiving from the said county any money upon account or in payment of his said warrants, did, during his said term of office, unlawfully and wrongfully receive from divers and sundry persons, in payment of taxes of said county, divers and sundry warrants of said county, the said persons not being legal holders thereof, because the said warrants were in no case payable to such persons and were in no case transferred to such persons by assignment in full, and said persons, not being entitled to pay

the same in for taxes, because no taxes were assessed or existing against them; that said Winterbottom, upon receiving such warrants, gave receipts discharging from further payment the persons against whom said taxes were so assessed and existing, to an amount equal in each case to the amount of warrants so received; that from the eighteenth day of March, 1879, to the first day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as aforesaid, and not otherwise; that all the taxpayers of said county from whom any county taxes were due during said period have received from said Winterbottom full acquittances without the payment of any money, and without any payment except in warrants as aforesaid.

Plaintiff further states that the said Winterbottom, as required by law, once in each month during the said period made statements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of said county the said warrants so received as aforesaid; that the said Winterbottom, as such collector, and the said treasurer at various times during the years 1879, 1880, and 1881, made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court and filed with the clerk of said court all the county warrants so received by the said collector, and by him delivered to the said treasurer, and the said county court accepted and approved the settlements of the said collector and the said treasurer, and approved the acts of the said collector in receiving warrants in payment of taxes as aforesaid, and ratified and confirmed the release and discharge of said taxpayers from payment of their taxes as aforesaid, so that the same cannot again be demanded of them.

Plaintiff states that by the means aforesaid the said Winterbottom has unlawfully and wrongfully prevented

any money from coming into the treasury of said county, in consequence whereof said Harshman has been unable to obtain payment of his said warrants, and that his acts so done as aforesaid have been done with the unlawful and fraudulent purpose of defeating the collection and preventing the payment of said Harshman's warrants, and have defeated their collection and prevented their payment.

For further breach of the aforesaid bond plaintiff states that the said Winterbottom, in disregard of his duty as such collector, and unlawfully and wrongfully contriving and intending to prevent any money from coming into the treasury of said county, and to prevent the said Harshman from collecting or receiving from the said county any money upon account or in payment of his said warrants, did, during his said term of office, unlawfully and wrongfully receive in payment of taxes of said county divers and sundry warrants of said county; that said warrants had, before they were so received for taxes, been issued by order of said county court for work and labor done, and services rendered and materials furnished to said county, but the same were payable to bearer; that upon so receiving said warrants Winterbottom gave receipts, discharging from further payment the persons against whom said taxes were so assessed and existing to an amount equal in each case to the amount of warrants so received; that from the eighteenth day of March, 1879, to the first day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as last aforesaid, and not otherwise; that all the taxpayers of said county, from whom any county taxes were due during said period, have received from said Winterbottom full acquittances, without the payment of any money, and without any payment except in warrants, as last aforesaid.

Plaintiff further states that the said Winterbottom, as required by law, once in each month during the said period made statements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of the said county the said warrants so received as aforesaid; that the said Winterbottom, as such collector, and the said treasurer, at various times during the years 1879, 1880, and 1881, made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court and filed with the clerk of said court all the county warrants so received by the said collector and by him delivered to the said treasurer, and said county court accepted and approved the settlements of said collector and the said treasurer and approved the acts of the said collector in receiving warrants in payment of taxes as aforesaid, and ratified and confirmed the release and discharge of said taxpayers from payment of their taxes as aforesaid, so that the same cannot again be demanded of them.

Plaintiff states that by the means aforesaid the said Winterbottom has unlawfully and wrongfully prevented any money from coming into the treasury of said county, in consequence whereof said Harshman has been unable to obtain payment of his said warrants, and that his acts, so done as aforesaid, have been done with the unlawful and fraudulent purpose of defeating the collection and preventing the payment of said Harshman's warrants, and have defeated their collection and prevented their payment. Plaintiff states that by reason of the several breaches of the said bond herein alleged the said Harshman is damaged in the sum of one hundred thousand dollars, for which sum, with the cost of this suit, plaintiff prays judgment.

The demurrer is as follows:

The said defendants, by Dryden and Dryden, their attorneys, come and demur to the plaintiff's amended

petition herein this day filed, and say that said amended petition is insufficient in law to charge the defendants, and for causes of demurrer they assign the following:

1. Said amended petition does not state facts sufficient to constitute a cause of action.

2. Upon the facts stated in said amended petition the defendants are not answerable in this action, or in any action at law brought by the plaintiff at the relation of said George W. Harshman, relator, on their said bond.

3. The misfeasances and misconduct of the defendant Winterbottom, complained of in the said amended petition, are wrongs done to the county of Knox, for which the county has the exclusive right to sue at law, and yet it does not appear in or by the said amended petition that said county has in any wise complained of said supposed wrongs, or has in any wise joined in or authorized this suit, or that this is in any sense the suit of the county of Knox.

4. The law does not imply damage to Harshman from the facts stated in the said amended petition, and the petition fails to show special damage to him, and so no cause of action is shown in favor of Harshman.

5. The said Harshman has neither a legal nor an equitable title to sue; he has no legal title, because the wrongful acts complained of are wrongs to the county, which an action by the county would fully redress; he has no equitable title to sue, because it does not appear that the county has been in any wise requested to sue or has refused to sue for the delinquencies complained of, or that any of the conditions exist which would give Harshman the right to sue in equity.

6. Said amended petition is uncertain and insufficient in this, that it does not inform the defendants the names of the persons whose taxes, alluded to in the first breach, were unlawfully paid in warrants not belonging

to them; nor the amounts of the taxes thus paid; nor does it inform the defendants of the names of the taxpayers whose taxes, alluded to in the second breach, were paid in void warrants, nor the amounts of the taxes thus paid; and said amended petition is, in other respects, uncertain, vague, and contradictory, and the same should be ordered to be reformed and made certain and definite.

Wherefore, defendants pray judgment, etc.

BRIEF.

I.

Plaintiff's warrants were entitled to be paid out of the first funds which might come into the treasury of the county.

II.

Collector Winterbottom was guilty of a violation of law and a breach of his official bond in receiving warrants from taxpayers in payment of taxes in the manner charged in the petition.

III.

For this breach of his bond plaintiff is entitled to maintain this action.

1. The collector is a ministerial officer, and as such is liable to any person sustaining special damage by reason of any official misconduct on his part.

2. He is liable on his official bond at the suit of any such person.

3. The plaintiff has sustained special damage by reason of the acts complained of in the petition.

IV.

It is no defence that the county of Knox might sue. The county has not been substantially injured and could recover at most nominal damages.

V.

The petition is not uncertain or indefinite; but if it were, this defect could not be reached by demurrer. A motion to make more definite is the proper remedy.

ARGUMENT.

I.

The plaintiff's warrants were entitled to be paid out of the first funds coming into the treasury of the county.

As appears from the petition the plaintiff, in the year 1877, recovered two judgments against Knox county, one for $3258.15, the other for $6764.84, both on bonds issued pursuant to the charter of the Missouri and Mississippi Railroad Company. This charter provided for the levy of a tax of one-twentieth of one per cent. in each year to pay any bonds that might be issued under it and the interest on them. This levy had been made from year to year, but had been exhausted in paying other bonds of the same issue as plaintiff's, so that there were no funds for plaintiff's judgments. Besides this special levy, the county was by law authorized to make a levy for general county purposes, in each year, not exceeding fifty cents on each $100 of taxable property. The proceeds of this latter levy constituted the ordinary revenues of the county. It has been held by this court that when the special levy provided for these bonds is exhausted, any of the bonds remaining unpaid

are entitled to payment out of the ordinary revenues of the county.

United States v. County of Clark, 96 U. S. 211.

In order to secure the benefit of this ruling, plaintiff, Harshman, applied to the Circuit Court of the United States for the Eastern District of Missouri for a mandamus on the county court of Knox county, requiring the county court to issue to him warrants on the county treasury for the amount of his two judgments with interest—the warrants to be payable out of the ordinary revenues. The mandamus was ordered and issued, and afterward the judgment was affirmed by this court.

Knox County Court v. The United States ex rel. Harshman, 109 U. S. 229.

In pursuance of this mandamus, on the fifteenth of March, 1879, the county court issued the warrants; on the eighteenth of the same month they were presented to the treasurer of the county for payment, and payment was refused because there was no money in the treasury out of which they could be paid; and the treasurer so certified on the back of the warrants, and in addition caused them to be entered in his warrant book.

This, in common parlance, is called protesting and registering the warrants. By the law of Missouri, in force at the time, county warrants, when duly protested and registered, were entitled to payment in the order of their registration.

The statute was as follows:

"He (the treasurer) shall keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer, stating correctly the date,

amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants and in the order in which they shall be presented for payment."

Gen. Stat. Mo., 1865, p. 227, sec. 8.

The statute now in force is the same *verbatim*, except that it has the following proviso:

"Provided, however, that no warrant issued on account of any debt incurred by any county, other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual and for expenses necessary to maintain the county organization, for any one year, shall have been fully paid and liquidated."

Rev. Stat. Mo., 1879, sec. 5370.

This proviso seems intended to exclude warrants like the plaintiff's from the benefit of the rule of payment in order to which warrants in general are entitled; but it was not in force on the eighteenth of March, 1879, when plaintiff's warrants were presented. The Revision of 1879 did not take effect until November 1 of that year.

Rev. Stat., 1879, sec. 3168.

The former law, therefore, remained in force and was applicable to plaintiff's warrants.

Nor did the proviso, when it came into force, take effect as against plaintiff's warrants. The right of being paid in order gave plaintiff priority over all subsequently-registered warrants. It was in the nature of a lien, was part of the contract between the plaintiff and the county, and was a valuable right. Upon its preservation depended in large measure, or perhaps entirely, the value of the warrants. Without it payment would, or

at least might, be a matter of favor on the part of the treasurer, and plaintiff's warrants might be wholly worthless. It is like the faculty of being receivable for taxes which belonged to the Virginia coupons, considered in Antoni v. Greenhow, 107 U. S. 769, and other cases. The legislature can no more take away such a right as this than it can alter relative priorities among existing mortgages, or destroy any other valuable attribute they may possess.

Cooley on Constitutional Limitations (5 Ed.) 354 and note.

Edwards v. Kearzey, 96 U. S. 595.

Ralls County Court v. U. S., 105 U. S. 735.

United States v. Lincoln County, 5 Dillon 184.

This case is, therefore, to be determined as if the proviso found in the present statute did not exist.

But if this be held otherwise, still plaintiff's right of priority is only partially impaired. It existed beyond question as to all funds which came, or ought to have come, into the treasury between March 18, 1879, and November 1, 1879.

Furthermore, it is divested only in favor of warrants issued for "money due from the county on account of services that are usual and for all expenses necessary to maintain the county organization, for any one year." In other words, warrants like the plaintiff's are not to be postponed indefinitely, but only until such warrants for ordinary expenses as have been issued during "any one year" shall be paid. After that they are entitled to payment in order.

If, therefore, this proviso is good as against plaintiff, it only took away his right of priority as against ordinary expense warrants issued during the year beginning

November 1, 1879, and ending October 31, 1880. From the latter date until March, 1881, the end of Winterbottom's two-year term, it was again in force.

Not only were plaintiff's warrants registered; but the petition shows that they were registered ahead of all others which were outstanding between March, 1879, and March, 1881; and, therefore, are entitled to be paid first of all out of the ordinary revenues. They have never been paid.

II.

Collector Winterbottom was guilty of a violation of law and a breach of his official bond in receiving warrants from taxpayers in payment of taxes in the manner charged in the petition.

The collector's duty is to collect the county taxes.

The provisions of the statute are as follows:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days (not less than three) that he will remain at each of such places for the purpose aforesaid; and it shall be his duty to attend at the time and place thus appointed either in person or by deputy, to receive and collect such taxes."

Rev. Stat., 1879, sec. 6748.

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector, after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, of one per cent. per month upon all taxes collected by him after the first of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month. Collectors shall, on the day of their annual settle-

ment with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year; provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation."

Rev. Stat., 1879, sec. 6751.

"At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists, and in the city of St. Louis the uncollected tax bills, under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue; and the amount of such delinquent lists, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to him on his settlement. Before allowing the collector such credit for any delinquent lists, the county court shall make special inquiry, and be fully satisfied that he has used due diligence to collect the same, and that he could not find any personal property of the taxpayer out of which to make the taxes. If the court is satisfied that there are any names on the lists of persons who have personal property out of which the taxes could have been made, it shall, in passing upon such lists, strike such names therefrom."

Rev. Stat., 1879, sec. 6772.

And his duty is to pay over the taxes when collected to the county treasurer.

"Every collector of the revenue, having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant him full quietus under the seal of the court."

Rev. Stat., 1879, sec. 6822.

Such payments are to be made monthly.

"Every county collector and ex-officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road, and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required to forward immediately a certified copy of such detail statement to the state auditor, who shall keep an account of the state taxes with the collector."

Rev. Stat., 1879, sec. 6780.

To secure the performance of his duties he is required to give a bond, conditioned, among other things, that he will in all things faithfully perform all the duties of the office of collector according to law. The language of the statute is:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and in a sum at least double the amount of all the revenue to be collected by him for any one year, conditioned that he will faithfully and punctually collect and pay over all state, county, and other revenue for the two years next ensuing the first day of March thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent securities."

Rev. Stat., 1879, sec. 6733.

For the performance of his duties he receives a commission on the current taxes collected, ranging from one and one-half to ten per cent., according to the volume of revenues. Sec. 6785. In addition to this for collecting delinquent taxes he receives from four to ten per cent. Secs. 6786, 6842. Taxes are ordinarily to be paid in money, but the collector is authorized to receive county warrants in payment of county taxes.

"All state and county taxes shall be paid in gold or silver coin, United States legal tender notes, national bank notes, or auditor's warrants, and in no other currency: provided, that county warrants, coupons of county bonds, and jury certificates may be received in payment of county taxes."

Rev. Stat., 1879, sec. 6750.

But to be receivable for taxes such warrants must be presented by the legal holder thereof and must be presented in payment of a tax assessed against such holder.

"Every officer or person intrusted with the collection of any county or city revenue in this state, is hereby authorized and required to receive all county and city warrants presented to him by the legal holder thereof, in payment of any county or city revenue, license, tax, assessment, fine, penalty, or forfeiture, existing against said holder, and accruing to the county or city issuing said warrants."

Rev. Stat., 1879, sec. 5408.

The legal holder of a county warrant is either the person named in the warrant as paaye or some person to whom it has been transferred by one or more assignments. All such assignments must be in full; no blank assignments are allowed. See the following:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and, unless otherwise provided by law, in the following form:

"Treasurer of the county of ————: Pay to ————, ———— dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).

"Given at the court house, this —— day of ——, 18—, by order of the county court.

"Attest: C. D., Clerk. A. B., President."

Rev. Stat., 1879, sec. 5394.

"No county treasurer in this state shall pay any warrant drawn on him, unless such warrant be presented for payment by the person in

whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Rev. Stat., 1879, sec. 5396.

"All warrants drawn on the treasurer of any county shall be assignable, and every assignment of any such warrant shall be in the following form:

"For value received, I assign the within warrant to A. B., this —— day of ——, 18—. (Signed) C. D.

"No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same."

Rev. Stat., 1879, sec. 5397.

The petition shows that Collector Winterbottom, during his entire term (*i. e.*, from March, 1879, to March, 1881,) systematically and persistently disregarded these provisions, and instead of exacting cash from the taxpayers, or receiving warrants only under the circumstances permitted by law, took them indiscriminately from persons who had no lawful title to them and in payment of taxes assessed against persons other than the legal holders. And, further, the petition shows that during this entire period the taxpayers of this county paid their taxes in this unlawful way and not otherwise, that they have all received their acquittances for the taxes of these two years, and that the collector pursued this course in order to prevent any money from coming into the treasury of the county, and to prevent the plaintiff from receiving or collecting any money on his warrants.

In so doing he has certainly not faithfully performed his duty according to law and according to the obligation of his bond.

III.

For this breach of the collector's bond the plaintiff is entitled to maintain this action.

1. The collector is a ministerial officer, and as such is liable to any person sustaining special damage by reason of any official misconduct on his part.

(*a*) That the collector is a ministerial officer will, perhaps, not be disputed. A collector of customs has been decided to be such.

Tracy v. Swartwout, 10 Pet. 95.

His function under our statute is to "receive and collect" the taxes.

Rev. Stat., sec. 6748, *supra.*

In doing this it is said that he "may" receive payment of county taxes in county warrants. This does not vest in him anything like a judicial discretion; for "may" here means "shall."

Steines v. Franklin County, 48 Mo. 167.

The State v. Laughlin, 73 Mo. 443.

If this were doubtful the doubt would be set at rest by section 5408, *supra*, which declares that the collector "is hereby authorized *and required* to receive" county warrants in payment of county taxes.

(*b*) The rule is well settled that every ministerial officer is liable to any person sustaining special damage by reason of any official misconduct on his part.

In Tracy v. Swartwout, 10 Pet. 80, McLean, J., said (p. 95):

"It would be a most dangerous principle to establish, that the acts of a ministerial officer when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress."

Amy v. The Supervisors, 11 Wall. 136, was an action by Amy, a judgment creditor of Des Moines county, Iowa, against Burkholder and others, supervisors of said county, to recover damages for refusal on their part to obey a mandamus requiring them to levy a tax to pay his judgment. Swayne, J., said (p. 138):

"The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

The St. Joseph Fire and Marine Insurance Company v. Leland, 90 Mo. 177, was an action against county commissioners to recover damages for refusal to levy a tax to pay plaintiff's judgment. The defendants were held liable. Henry, C. J., said (p. 182):

"The common law gave the party aggrieved an action against the officer in such case."

Even such officers as school directors, who exercise functions of a discretionary character, are held liable where they "do acts not within the scope of their authority, or are guilty of negligence in doing that which they are empowered to do, or are guilty of arbitrary, wanton or oppressive conduct."

McCutchen v. Windsor, 55 Mo. 153.

See also Schoettgen v. Wilson, 48 Mo. 253.

Dritt v. Snodgrass, 66 Mo. 286.

Lampert v. Laclede Gas Light Co., 14 Mo. App. 376.

County Court ex rel. Jenks v. Fassett, 65 Mo. 418.

In Wilson v. The Mayor, 1 Denio, 595, the court say (p. 599):

"Public officers of every grade and description may be impeached or indicted for official misconduct or corruption. To this there is no exception from the highest to the lowest. But the civil remedy for misconduct in office is more restricted, and depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain and imperative, and every ministerial duty is so, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency."

Clark v. Miller, 54 N. Y. 528, was an action against a town supervisor for refusing to put on the tax list of the year a demand due plaintiff from the town on an assessment of damages in his favor. Johnson, J., said (p. 534):

"A ministerial officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuses to perform it."

The supervisor was held liable.

Raynsford v. Phelps, 43 Mich. 342, was an action by a mortgagee of land against a collector of taxes for negligently failing to make the taxes assessed against the land out of the goods of the mortgageor, and falsely returning that he had no goods, whereby the lien of the tax was established against the land and the mortgagee was obliged to redeem from a sale thereunder. Cooley, J., said:

"It is immaterial that the duty is one primarily imposed on public grounds; and, therefore, a duty primarily owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against. It is, also, immaterial that a failure in performance is made by the law a penal offence. * * *

"Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen, therefore, and their duties imposed on public grounds, not on private. If through any negligence on the collector's part the state loses a portion

of its dues, the officer is responsible to the state for the loss; but it is denied that he owes any duty to individuals, except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public only.

"But conceding that the law creates the office of collector in order that the public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of taxes, and whose property may be levied upon therefor, it at the same time, by implication, forbids the officer to seize upon the property of others, or by any act or omission make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy and sell in reliance upon the duty being performed. He has a right to understand that the officer is commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys his commission and is not within the protection the commission might otherwise give. * * *

"Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French (the owner of the land) should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover, he alone suffered injury from the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the tax was collected from one man when the command of the law was that it should be collected from another. If there is no wrong without a remedy, then it would seem that this action should be supported, for the defendant is the only wrongdoer."

Wasson v. Mitchell, 18 Iowa, 153, was an action against several persons constituting a board of county supervisors. The board had accepted and approved the bond of one Helton as constable, with the names of Marsh and Van on it as sureties. Helton had collected money for plaintiff, Wasson, and failed to pay it over. The petition alleged that Helton had died insolvent, and that his bond was worthless, one of the supposed sureties being insolvent and the signatures of both to the bond being forgeries, and that the defendant supervisors knew of the insolvency and would have known of the forgery, but for their negligence. It sought

recovery in damages. Dillon, J., after stating the several statutory provisions pertinent to the case, said (p. 155):

"These various provisions evince the care and solicitude of the legislature to protect the public by requiring ample and sufficient bonds from public officers. How useless these provisions and how unavailing these intended safeguards, if the approving board or officer could, under no circumstances and in no possible event, be held liable for omission or neglect of duty."

After pointing out the difference between judicial and ministerial officers, in respect of their liability for official acts, the learned judge proceeded:

"We would not hold the board of supervisors to be absolute guarantors of the genuineness of the signatures to official bonds. They may, in the course of business, refer such matters to a committee to examine and report. It is only necessary that they or their committee shall act in good faith and with reasonable care and prudence. If, in the fair exercise of their judgment, they are of opinion that the sureties on a bond are solvent they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to be worthless. So they would have no right to approve a bond without any sureties whatever. Such an act, knowingly or carelessly done, could not be regarded as a judicial act, in such a sense as to exempt them from civil liability to any person thereby injured. * * * We believe this to be the true rule, viz: Exempting the board of supervisors, in the approval of bonds, from honest mistakes and errors of judgment, whether of law or fact, but holding them at the same time personally liable for negligence, carelessness and official misconduct such as are alleged in the petition. This rule is the only one which will protect the public and at the same time occasion no injury or embarrassment of which a conscientious and faithful officer will or can justly complain."

Pickering v. James, L. R. 8 C. P. 489.

In this case it is held that the English Ballot Act of 1872, by implication, imposes a duty on the presiding officer at a polling station during an election to deliver to the voters voting-papers bearing the official mark appointed under the act for the election, and to be present during such election at the polling station, so

that the voters, before depositing their voting-papers in the ballot-box, can show to him the official mark on the back of such papers in accordance with the act; and that for breach of these duties, being merely ministerial, an action will lie by the party aggrieved, *ex. gr.*, one who has thereby lost the election through votes given to him being void for want of the official mark, without malice or want of reasonable care on the part of the defendant. Brett, J., said (p. 509):

"The next question is, whether the duties imposed by the act are such as to give a right of action against him (the presiding officer) personally for breaches of them, by individuals if personally aggrieved, without any allegation of malice or wilfulness. I think they are, because they are ministerial duties merely, and the general rule of law is that a breach of these duties gives a right of action to the party aggrieved thereby."

And so the whole court agreed. These duties, it must be observed, were not due primarily to the candidate, but to the voters; but the candidate was allowed to maintain an action for the breach of them.

Hover v. Barkhoof, 44 N. Y. 113, was an action against commissioners of highways for negligently failing to keep a bridge in repair, whereby plaintiff lost his horses and wagon. Earle, Commissioner, said (p. 119):

"The defendants, therefore, can not succeed in their defense unless they can establish the doctrine found in the dicta of some learned judges, that a public officer charged with public duties and receiving his compensation from the public, is liable only to indictment for non-feasance in the discharge of his official duties; and that he is not liable in a civil action to individuals sustaining special damage from such non-feasance. I can not assent to this doctrine. It is neither founded on principle nor sanctioned by public policy. * * * * * He (Judge Wright, in 29 N. Y. 297) holds that commissioners of highways, and other public officers who receive their compensation from the public, owe no duty to individuals, but owe duty only to the public at large. Is this tenable? The public is composed of individuals, and every individual who travels is interested in the discharge of the duties of these officers. The public, as distinguished from individuals, has no interest in them. They receive their compensation from the town, a

municipal corporation which acts for and represents the individuals of the public. The compensation is paid for and on behalf of such individuals; and thus these public officers are brought into relations with every individual who has an interest in the discharge of their duties, just as much as if individuals directly paid the compensation for their services."

In the same case Leonard, Commissioner, said (p. 116):

"One who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties."

Robinson v. Chamberlain, 34 N. Y. 389, was an action against canal contractors. Hunt, J., said (p. 399):

"The canal contractor was invested with the powers and subject to the liabilities of a public officer. * * * He is invested with the powers and duties of a public officer, and if he neglects to perform them, and an individual sustains damages thereby, I think he should be liable as a public officer."

Peckham, J., said (p. 393):

"An officer really contracts with the government faithfully to discharge the duties of his office, and he usually adds an oath to that effect. He voluntarily assumes the duties. The public, the individuals, usually are more especially interested in the proper discharge of the duties than the government itself. The principle on which the action is based in each case against an officer or contractor with the government is a broad principle of public policy, essential to the public welfare. The law presumes that an office is created for the benefit of the public."

In Nowell v. Wright, 3 Allen, 166, the court say:

"While admitting the general principle, Chancellor Kent, in Bartlett vs. Crozier, 15 John. 450, would confine the right of action to cases where the services of the officer are not gratuitous or coerced, but voluntary, and attended with compensation; and also where the duty to be performed is entire, absolute and perfect. To this we may add that the duty should be a personal one, and not only one which he is under obligation, but clothed with ability to perform, both in the means furnished to him, and the legal authority to act irrespective of superior officers."

There are cases which distinguish between positive acts of misfeasance and mere acts of non-feasance, omission or negligence on the part of a public officer.

Thus, in Moulton v. Jose, 25 Me. 76, the court, reviewing certain cases, say (pp. 80-81):

"To reconcile these authorities it should be observed that the first has reference to acts directly injurious to others, and the two latter, to neglects not immediately affecting others, and not to positive acts. It may not be going too far to say that whenever a sheriff is guilty of any act under color of his office directly affecting the rights of parties not named in his precept, they have a remedy against him; while if he omits the performance of any duty resulting from a precept in his hands, those alone who are parties thereto or immediately affected thereby can maintain any action against him therefor. The omission in this case is one of non-feasance arising from negligence"; and as the plaintiff was not a party to the precept, *held*, that he had no cause of action.

So, in Harrington v. Ward, 9 Mass. 251, it was held that a sheriff is answerable for his negligence in the service of process in a civil action to none but the parties to the action.

On the other hand, in Whittaker v. Sumner, 9 Pick. 308, it was held that where an officer made a false return of levy and sale upon an attachment, whereby a subsequently-attaching creditor was prevented from levying upon the same property, and making his debt, the latter had a cause of action against the officer.

And again, in Green v. Kennedy, 46 Barb. 16, it was held that if a policeman go to sleep on his beat, and a burglar, taking advantage of his want of vigilance, commits a burglary, the sufferer can not maintain an action for damages against the policeman. But on the other hand, in Dilcher v. Raap, 73 Ill. 266, it was held that such an officer will be liable in trespass for an arrest and imprisonment made by him "not acting in

the honest discharge of official duty, but rather in the espousal of another's private quarrel, and in carrying out a purpose of revenge and the infliction of injury."

The acts complained of in the case at bar are not mere acts of negligent omission, but positive acts of intentional misfeasance. Winterbottom did not omit to collect the county revenue. He collected it; but instead of exacting money, he received county warrants which he was not authorized by law to receive, and he did this for the express purpose of preventing money from coming into the county treasury, to the end that by this means he might defeat the collection of plaintiff's lawfully registered warrants. This was such a wrong to plaintiff and such a fraud upon his rights as entitles him to redress on the collector's bond even under the narrowest rules laid down in the books.

2. *The collector and his sureties are liable on his official bond for any official act for which he may be sued personally.*

Section 2404, Revised Statutes 1879, is as follows:

"Persons injured by the neglect or misfeasance of any officer may proceed against such principal, or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

This is found in the chapter on executions, and might, therefore, be supposed to refer only to officers charged with the duty of enforcing executions. But a search of the statutes discloses the fact that this provision originated in the Acts of 1840–41, and is section five of an act entitled, "An act to better secure the liability of county officers on their official bonds."

Acts 1840–41, p. 31.

There it refers to sheriffs, clerks, collectors, and all other county officers. In the revision of the statutes

which was made in 1845, it appears in the chapter on executions, and has there remained ever since.

See R. S. 1845, p. 487, sec. 61.

R. S. 1855, p. 752, sec. 68.

G. S. 1865, p. 648, sec. 66.

Wag. Stat. 1872, p. 615, sec. 66.

R. S. 1879, sec. 2404.

The transfer into the chapter on executions cannot have changed its meaning.

Losing sight of this statute, the Supreme Court of Missouri has considered the question of the collector's liability as a common-law question, and has decided that it may be enforced in an action on his bond by any one aggrieved by his official misconduct.

The State to use v. Shacklett, 37 Mo. 280, 285.

The State to use v. Powell, 44 Mo. 434.

The State to use v. Moore, 19 Mo. 372.

Such an action is properly brought, as this is, in the name of the State of Missouri to the use of the party aggrieved.

The State to use v. Davis, 35 Mo. 406.

3. We have now to inquire: *Did the plaintiff have a special interest in the performance, by Winterbottom, of his duties as tax collector; and did he sustain a special damage by Winterbottom's failure to perform them? If he did, he might have sued Winterbottom personally, and, therefore, may maintain an action on his bond.*

To constitute a special interest, or damage, it must be one not common to the rest of the public. If Harsh-

man had an interest apart and distinct from any interest that every other individual in the community had, he had a special interest, and if he sustained a damage peculiar to himself, and not shared in by every other individual in the community, it was a special damage.

What interest, then, had the public at large in the matters complained of in this petition, and what damage did they sustain? We do not now speak of the county of Knox in her corporate capacity. Her interest and her loss we shall presently consider. We speak rather of the community in general, and the individuals who compose it. It is plain that they have no interest in the lawful administration of the county's finances, beyond that general interest which every individual must feel in the due execution of the laws of the country, and that they sustained no damage beyond that general wrong which all are supposed to suffer when the laws are infringed.

Harshman, on the other hand, had a peculiar interest, and sustained a certain and peculiar injury. He was a creditor of this county, with warrants duly presented, protested, and registered, and awaiting, and entitled to, payment out of the first funds to come into the treasury. He had put himself in that position in pursuance of provisions of the statute law already shown to the court. These provisions are part of an elaborate and carefully-devised system, framed with a view to protecting, on the one hand, the interests of the counties; and, on the other hand, and quite as much, the interests of their creditors. Ordinarily the counties get everything on credit. They rarely pay in cash, and never in advance. The plan of county finance is arranged with reference to this fact. In order to make it possible for the counties to obtain credit, many safeguards have been thrown around the rights of creditors, and many restrictions have been imposed upon county

officers. Conspicuous among these is that provision which secures the payment of warrants in the order of their presentation to the treasurer. Without this rule, the payment of county warrants would be largely a matter of favor, depending upon the will of the treasurer. Personal or political friends, influential citizens, or those willing to submit to a "shave" from the treasurer, or some confederate of his, might get their warrants paid while other creditors waited. To guard against these, and like possible abuses, this provision was introduced. To a limited extent, this rule is relaxed by section 5408, *supra*, which allows the collector, under the restrictions therein named, to receive warrants in payment of taxes without reference to registration. But, except as allowed by this section, no fiscal officer of the county can lawfully permit, or secure, the payment of any warrant in preference to others previously registered. Manifestly, it is of the utmost importance to the holders of registered warrants that the restrictions of this section shall be faithfully observed by the collector. To refrain from any impairment of the security thus guaranteed to them, is a duty which he owes them. To the extent of his rights as a warrant holder, every individual has an interest in the due and proper collection of the county taxes, and any failure in this regard, affecting him, constitutes a special damage peculiar to him as distinguished from all other individuals in the community, and entitles him to seek redress in the courts.

Especially is this the case when it appears, as it does here, that the officer's violation of duty grows out of no inadvertence or mistake, but was committed with the express purpose of defeating the legal rights of the warrant holder. This is such an act of wilfulness and oppression as would render liable even an officer exercising functions of a discretionary character.

In Findley v. McAllister, 113 U. S. 104, this court was called upon to consider the nature of the interest which a judgment creditor of a county had in a tax levied expressly for the purpose of paying his own and other judgments. Mr. Justice Woods, delivering the opinion, said (p. 110):

"It is evident from the provisions of the statutes of Missouri, whose substance has been given, that the money received by the collector of Scotland county in payment of the special tax ordered by the county court to be collected for the payment of the judgment of the plaintiff and other judgment creditors, would, when collected, constitute a separate fund in the county treasury applicable to this purpose. If the special tax had been collected, the plaintiff would have had such an interest therein that a court of equity would, at his instance, enjoin its diversion to any purpose save that for which it had been levied and collected, and compel its payment to the satisfaction of the judgment of the plaintiff (citing authorities). The use of the money by the county, except for the payment of the judgments, which the writ of mandamus had been issued to enforce, would have been a clear contempt of the orders and process of the circuit court, as well as a violation of the law of the state.

"The writ of mandamus, under which the collector was proceeding to collect the money to pay the judgment of plaintiff, was a substitute for the writ of *fieri facias*, and was the only remedy by which the plaintiff could enforce satisfaction. He had, therefore, as clear an interest in the money to be raised by the special tax for the payment of his judgment, as he would have had in the money to be collected by the sheriff on execution if his judgment had been against an individual. It would seem fairly to follow that he had the same rights, in the one case as in the other, against those who, to prevent the satisfaction of his judgment, unlawfully interfered with the officer in the discharge of his duty. * * * The objection that the plaintiff is only injured in common with all the other members of the body politic, and has no separate and individual cause of action, cannot be successfully urged."

There is an apparent difference between the above case and the present. In that the tax was levied for the express purpose of paying the plaintiff's debt. In this it was not. Nevertheless the cases are not essentially different; for the taxes which should have been collected by collector Winterbottom were quite as effectually set

apart for Harshman's benefit as if they had been specially levied for him. As already shown, his warrants, when registered, became entitled to payment before any others afterward issued, and there being none of earlier issue outstanding, were entitled to be paid first of all. They thus fastened themselves as a lien upon the proceeds of any county tax that could be levied, and from the moment of their registration so much of the county taxes as were necessary to pay them were appropriated to that use, and could not lawfully be diverted to any other. Harshman's warrants having been issued, as Findley's tax was levied, in obedience to a writ of mandamus from the circuit court, the above quoted language of this court is literally applicable to this case: "The use of the money by the county, except for the payment of the judgments, which the writ of mandamus had been issued to enforce, would have been a clear contempt of the orders and process of the circuit court, as well as a violation of the law of the state."

There is one remark of Mr. Justice Woods, in the Findley case, to which I wish to direct special attention, since it is liable to be misunderstood. At the bottom of page 110 he says:

> "It is plain that the injury of which the plaintiff complains is not one common to himself and the public at large, *as it would have been had the defendants interfered to prevent the collection of the general taxes of the county.*"

To correctly understand this, it must be remembered that Findley had no claim upon the general taxes of the county. He was limited to a tax specially levied for him. His interest in the collection of the general taxes was, therefore, only such as every other citizen had. Harshman, on the other hand, has the special interest conferred by his warrants drawn against the general fund. The remark of Mr. Justice Woods, therefore, does not at all militate against our position.

Several of the cases cited in the former part of this brief show, in various aspects, what interests of the individual are sufficiently direct to enable him to vindicate his own rights in the courts when they are infringed or threatened by official dereliction.

Thus, in Raynsford v. Phelps, 43 Mich. 342, the mortgagee, who had been compelled to pay a tax on the mortgaged land, which could have been collected out of the goods of the owner of the land, and would have been but for the negligence of the collector, was deemed to have a sufficiently direct interest in the performance by the collector of his public duty of collecting the taxes, to raise a private duty on the part of the collector toward him, and to sustain an action for the negligence.

In Wasson v. Mitchell, 18 Iowa, 153, the creditor who had lost his debt through the worthlessness of the constable's bond, was deemed to have such an interest in the due performance by the supervisors of their duty of securing a good bond as enabled them to sue the supervisors for their delinquency in that behalf.

In Pickering v. James, L. R. 8 C. P. 489, the candidate who had lost the election through the failure of the election officers to be present and give out properly-marked voting-papers, whereby ballots cast for him had been rejected as illegal, was considered to have a direct interest in the performance by the officer of his duties; he was allowed to maintain the action.

In other words, in all these cases the officer owed a duty to the plaintiff, for a violation of which the plaintiff could sue. It may be the duty was less obvious than some other duty he owed; for instance, in the election case, no one would doubt that the officer owed a duty to the voter to be present and conduct the election properly; but this did not prevent him from also owing a duty to the candidate in respect of the same matter.

So, in the present case, we do not deny that collector Winterbottom owed a duty to the county of Knox to collect the taxes according to law; but we say that did not prevent him from owing a like duty to the county's creditor.

The public and the individual injured may sometimes both have their appropriate remedies grounded on the same official misconduct.

Cummings v. City of St. Louis, 90 Mo. 264.

Water Commissioners v. East Saginaw, 33 Mich. 164.

The following belong to a large class of cases in which the courts have been called on to determine what interest a private individual ought to have to enable him to call in question the acts of public officers.

Newmeyer v. Railroad Company, 52 Mo. 81, was a suit brought by certain taxpayers of Macon county, praying to have an order of the county court of that county, subscribing stock to the railroad company and providing for the issue of bonds to pay the subscription, set aside, and to have the bonds delivered up and cancelled. The petition charged that the subscription had been made and the bonds had been issued in pursuance of a corrupt and fraudulent arrangement between the county court and the railroad company, and that the plaintiffs, as taxpayers, would be subjected to an increased burden of taxation in consequence of the issue of the bonds. The defendants insisted that the plaintiffs had no such special interest in the matter as entitled them to maintain the suit; and urged that the injury was to the public, and could be redressed only in a suit brought by the attorney general on behalf of the public. Ewing, J., in answer to this contention said:

"The injury charged as the result of the acts complained of is a private injury, in which the taxpayers of the county are the individual sufferers, rather than the public. The people out of the county

bear no part of the burden; nor do the people within the county, except the taxpayers, bear any part of it. It is, therefore, an injury peculiar to one class of persons, namely, the taxpayers of the county of Macon."

To the same effect are:

Willard v. Comstock, 58 Wis. 565.

Board of Commissioners v. McClintock, 51 Ind. 325.

Colburn v. The Mayor (Supreme Court of Tennessee) 17 Am. Law Reg. 191.

See also Cummings v. City of St. Louis, 90 Mo. 264.

The Mayor v. Gill, 31 Md. 375, was a case in all essentials like Newmeyer v. The Railroad Company. The court said (p. 392):

"The remaining question for consideration is the right of the appellees to maintain the suit. The bill is filed by them as taxpayers on real and personal property situated in the city of Baltimore. They sue in behalf of themselves and of all other persons similarly interested who may desire to make themselves parties to the proceeding. It has been argued that the wrong complained of is of a public nature, affecting the whole public alike, and can be redressed or prevented only by proceedings instituted on behalf of the public, in which the attorney general, as representing the state, is a necessary party, and that no action can be maintained by individuals, or relief granted on their suit. * * * It is certainly well settled that public wrongs can not be redressed at the suit of individuals, who have no other interest in the matter than the rest of the public. Thus, an individual can not maintain injunction to prevent a public nuisance, unless he suffers thereby some special damage; and the principle governing cases of that kind has been supposed to be applicable to the present case. But it appears from the averments of the bill that these complainants, as taxpayers of the city, and others similarly situated, in whose behalf as well as their own the bill is filed, constitute a class specially damaged by the alleged unlawful act of the corporation, in the alleged increase of the burden of taxation upon their property situated within the city. The complainants have, therefore, a special interest in the subject matter of the suit, distinct from that of the general public. * * * If the right to maintain such a bill as this be denied, citizens and property holders residing or holding property within the limits of a municipal corporation would be without adequate remedy to prevent the injury and damage which might result to them from the unauthorized or illegal acts of the municipal government."

Collins v. Ripley, 8 Iowa, 129, was a suit for an injunction to restrain county officers from canvassing votes cast at an election for removal of a county seat. Objection, that plaintiff showed no special interest. The court said :

"Collins complains in behalf of himself, and others, as it is understood, though imperfectly stated, whom he represents to be citizens and residents of the present county seat, and avers that they are directly and materially interested in the retention of it at that place. His position as a citizen, and his interest as such in the public welfare, entitle him to present a petition to restrain a public officer from an act which would be a public wrong."

Page v. Allen, 58 Pa. St. 338.

"The interest of a taxpayer, where money is to be raised by taxation or expended from the treasury, entitles him to test in equity the validity of the law which proposes the taxation or expenditure."

If the decisions in Newmeyer v. Railroad Company, The Mayor v. Gill, and the other cases of that class are sound, it seems to follow that the plaintiff is entitled to maintain this action. If one who is in danger of being called on to pay money into the public treasury, by reason of that fact has such an interest in the due performance by public officers of their public duties that he may maintain an action in his own name to prevent or correct official dereliction, why may not one who is expecting and entitled to receive money out of the public treasury do the same? How can it be said that his interest is any less direct or certain? The Supreme Court of Missouri say that it is a private injury to the taxpayer of the county when he has to pay taxes to meet the interest on fraudulent bonds. It must, for like reasons, be a private injury to the creditor of the county when the fund to which he looks for payment of his debt is dissipated by some unlawful act.

It is immaterial that in the cases cited the plaintiffs sued on behalf of themselves and the other taxpayers of

the county, while the present action is brought for the sole benefit of plaintiff Harshman. It was not the representative capacity of the plaintiffs in those cases—which after all was self-assumed—but their private right growing out of the private injury they had sustained, that was held to give them a standing in court. In Cummings v. St. Louis, *supra*, Cummings did not profess to sue on behalf of anybody but himself.

It is likewise immaterial that while this suit seeks redress for a consummated wrong, the cases cited were, most of them, brought to avert threatened injury. In Willard v. Comstock this was not altogether so; the court not only enjoined any further sales of the county's tax certificates, but also set aside those already made. If it were conceded that the plaintiff Harshman, if he had known of collector Winterbottom's misdoings in time, might have obtained an injunction against their continuance, it would be difficult to show that he can not maintain the present action; for whether the relief sought be preventive or corrective, can be of no importance when the question is as to the plaintiff's right to seek any relief. Nor do courts of equity decide the question of interest in the plaintiff, and his consequent right to sue, on principles different from those which govern in courts of law.

If the plaintiff can not maintain this action, a course of official misconduct, conceived and executed for the express purpose of injuring him, and knowingly and wilfully persisted in by the collector during his entire term, and resulting in preventing the collection of plaintiff's claims, will go unpunished, the plaintiff's injuries will go unredressed, and future collectors, by a repetition of the same practices, will be able forever to prevent the plaintiff from realizing a dollar.

The petition shows that but for the acts of the collector money would have come into the treasury more

than sufficient to pay plaintiff's warrants. It can not, therefore, be said that the connection between the collector's act and the plaintiff's failure to get his money is too remote, or that the one is not the proximate cause of the other. No intervening agency occurred or concurred to produce the result. If the money had come into the treasury the plaintiff would have obtained satisfaction; the law provides the means for that.

In County Court ex rel. Jenks v. Fassett, 65 Mo. 418, it appeared that a grocer obtained from a manufacturer of coal oil a barrel of oil marked by Fassett, who was inspector of oils, "approved." This was the official mark, and had been put on by Fassett while the barrel was empty, in violation of law. The oil was below the test indicated by the official mark. The grocer sold some of it to a man whose wife was burned to death by an explosion of the oil. The inspector had given an official bond "for the use of all persons aggrieved by his acts or neglect." On demurrer to a petition counting on this bond and averring these facts the lower court held that the husband was not entitled to recover, considering the injury too remote. The Supreme Court reversed the judgment, Sherwood, C. J., saying:

> "But for the inspector's dereliction of the duties imposed upon him, it would have been beyond the power of the manufacturers to have put upon the market and successfully sold as genuine and safe, an article of oil, the sale of which the law condemned, and which the inspector was required to brand accordingly."

In Whitaker v. Sumner, 9 Pick. 308, it was held that where an officer had made a false return of levy and sale upon an attachment, whereby a subsequently-attaching creditor was prevented from levying upon the same property and making his debt, the latter had a cause of action against the officer, and might recover of him the amount of his debt.

The acts complained of in the present case are certainly more intimately connected with the loss Harshman has sustained, than were those alleged in the above cases with the damage to the plaintiffs therein. When Winterbottom stopped the flow of money into the county treasury, it necessarily followed that the plaintiff would not get his warrant paid; but it did not necessarily follow from the false branding of the oil barrels that Jenks' wife would be burned to death, or from the false return of the sheriff in the Massachusetts case, that Whitaker would be misled into withholding his execution.

It is immaterial that the taxpayers are in law still liable for the taxes.

In United States v. Morgan, 11 How. 154, Woodbury, J., said (p. 159):

"And as the collector here has given a discharge for the duties to the amount of these notes, and has acknowledged the receipt of payment for the duties to the government, as well as the importer, and received or paid over nothing for them which he was authorized to receive, he must stand chargeable for that amount * * * Though the government might still possess a remedy against the importer for the duties, there having been no valid payment made by him, yet this is no bar if they choose to resort to their remedy on the bond of the collector, for his official negligence and wrong in taking for their revenue counterfeit or cancelled notes."

IV.

It is no defense that the county of Knox might sue. The county has sustained no substantial injury, and could recover at most nominal damages.

The warrants which were unlawfully received by the collector had been issued for work and labor done and services rendered and materials furnished to the county, and when they were taken up and returned into the county treasury, the obligations of the county for

such work and labor, services and materials were to that extent discharged, and as they were received at par the county suffered no loss. Furthermore, all this was done with the knowledge and consent of the county treasurer, who accepted from the collector the warrants so received by him. The following statute defines the duty of the treasurer in respect to receiving warrants from the collector:

"No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county, as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: provided, however, that nothing herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in payment of county tax; provided, further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list of such scrips and warrants, under oath, specifying the number and amount thereof and from whom received; and said list shall be filed and preserved by the treasurer."

Rev. Stat. 1879, sec. 5371.

The list required by this section to be filed by the collector with the treasurer, showing from whom the several warrants have been received, it may be remarked, is intended as a check on the collector, and enables the treasurer, by a comparison of this list with the warrants themselves, to determine with certainty whether the collector received them from the lawful holders. As already shown, the lawful holder of a warrant is either the payee named in it, or some person to whom it has come by one or more assignments in full. Every war-

rant, therefore, carries its own evidence as to who is its lawful holder, and by comparing it with the collector's sworn statement the treasurer may always ascertain whether it was lawfully received or not.

Not only did the treasurer accept these warrants from the collector, but they were in turn accepted from the treasurer by the county court; that body is the fiscal agent of the county.

R. S. Mo. 1879, secs. 1199, 5388.

Hannibal, etc., R. R. Co. v. Marion County, 36 Mo. 303-4.

To it is confided the duty of bringing the collector to account at each regular term of the court (*i. e.*, four times in each year) for all county funds coming into his hands, and of exacting from him in March of each year a complete statement of all the taxes (county, state, school, etc.) collected and uncollected for the previous year, and a settlement of the same.

Rev. Stat. 1879, sec. 6772.

The county court accepted and approved the settlements, both of the treasurer and the collector, and approved the acts of the collector in receiving warrants in payment of taxes.

Under these circumstances, if the county should sue Winterbottom on his bond, she could recover but nominal damages. The real loss has not fallen on her, but on the plaintiff Harshman. Her obligations have been cancelled to the full amount of the taxes discharged, and this with the full knowledge and approval of her fiscal officers and representatives; while Harshman's demands remain unsatisfied. Winterbottom's illegal acts, therefore, constitute no substantial wrong or injury to the county; but are a substantial injury to the plaintiff.

The breach of duty being, so far as the county is concerned, merely technical, according to some authorities she could not sue.

Olmstead v. Brush, 27 Conn. 530.

Taylor v. Mygatt, 26 Conn. 191.

Paul v. Sleason, 22 Vt. 238.

Parker v. Kett, 12 Mod. 472.

But even if the action could be maintained, the fact that the county's liabilities have been discharged could be shown in mitigation of damages, and would reduce them to a nominal sum.

The rule is well established and seems to be of universal application that where a party has violated the rights of another, if he, at the same time and by the same act, discharges a liability of, or in any way confers a benefit upon, the other, that fact may be shown in mitigation of damages.

Thus, Mr. Greenleaf, in discussing the rule of damages in trover, says (2 Greenleaf on Evidence, sec. 276):

"And if the property, in whole or in part, has been applied to the payment of plaintiff's debt or otherwise to his use, this may be considered by the jury as diminishing the injury and consequently the damages."

The principle is affirmed in many different classes of cases. For instance, where a collector of taxes, or an officer charged with the enforcement of a writ of attachment or execution has made an unlawful levy to satisfy a legal tax, or a valid judgment, and the proceeds of the property seized have gone to pay the tax, or to satisfy the judgment, or some other indebtedness of the owner, in an action against the officer for an unlawful levy, he

will be allowed to show this fact in mitigation of damages.

Alexander v. Helber, 35 Mo. 334, is a case of this class. It was a suit against a collector of taxes to recover damages for the unlawful seizure and sale of a negro slave. The seizure had been made to secure payment of a tax due from the plaintiff, and the proceeds of the sale had been applied, as far as needed, to the payment of the tax, and the residue had been returned to the plaintiff. The court below refused to allow the amount of the tax paid in mitigation of damages. The Supreme Court held this to be error, Bates, C. J., saying:

"Assuming that the value of the negro, with proper deductions from that value, is the correct measure of the plaintiff's damages, yet the amount of the taxes should have formed a part of the deduction. As a mere trespasser, A has no right to take the property of B and apply it to the payment of B's debt, and in a suit by B against A that application of it would not mitigate the damages which B could recover; but the authorities seem to make an exception in the case of an officer, who commits a trespass by an honest mistake and in the discharge of what he believed to be his duty, and to mitigate the damages by the amount of the tax or debt of the plaintiff which was paid by the defendant."

The reasons of this rule are well stated in Doolittle v. McCullough, 7 Ohio St. 299, and Pierce v. Benjamin, 14 Pick. 356.

In the former case the court say:

"The value of property, it is true, in an action of trover, is the general rule of damages. But, under this general rule, there are certain exceptions as well established as the rule itself. These exceptions rest upon the same equitable principle that the rule does. That principle requires that the plaintiff should recover a just compensation, and no more, for the damages which he has actually sustained by the conversion of his property. If the property has been re-taken, or returned after taken, in whole or in part, such fact is always regarded as an exception to the general rule that the full value of the property should be regarded as the amount of damages to be recovered; and the facts are permitted to be given in evidence in mitigation of dam-

ages. Resting upon the same principle is the case where property has been taken in the exercise of a supposed right, and sold, *and the proceeds paid for the benefit of the owner in discharge of his indebtedness*, when it afterward turns out that the taking and sale were without authority. * * * If the proceeds of the sale had been paid to the owner, wherein would it have differed from a return of the property, or part thereof, to him? And we are not able to perceive why a payment of the proceeds for the owner, where he has unquestionably received the benefit of such payment, and the proceeding on the part of defendant has been in good faith, should not go in mitigation of damages."

Pierce v. Benjamin, 14 Pick. 356, was trover against a collector of taxes for an unlawful distraint upon a tax warrant. The collector had applied the proceeds of sale of the goods to the part payment of the tax, and claimed that he should be allowed this amount upon the assessment of damages. The court sustained this claim, saying:

"The general rule of damages in actions of trover is unquestionably the value of the property taken, at the time of its conversion. But there are exceptions and qualifications to this rule as plain and well established as the rule itself. Wherever the property is returned and received by the plaintiff, the rule does not apply. And when the property itself has been sold and the proceeds applied to the payment of plaintiff's debt, *or otherwise to his use*, the reason of the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications and are founded on equity and practical convenience."

To the same effect is Cressey v. Parks, 76 Me. 532.

Howard v. Cooper, 45 N. H. 339.

A debtor may maintain trover against an officer who attaches personal property of the debtor by law exempt from attachment; but if he has sustained no actual damage, he can recover nominal damages only; and where the property so attached was subject to a mortgage, and, after the attachment, was, by direction of the attaching creditor, who had become the legal owner of

the mortgage, duly sold by the officer upon the mortgage, and the proceeds of the sale, being less than the mortgage debt, were properly applied upon that debt, the sum for which the property was thus sold, it was held, should go in mitigation of damages; and there was a judgment for nominal damages only.

The rule is the same in trespass *de bonis asportatis.*

Felton v. Fuller, 35 N. H. 229.

Kaley v. Shed, 10 Met. 317.

Baldwin v. Porter, 12 Conn. 484.

Curtis v. Ward, 20 Conn. 207.

Analogous principles are applied in the case of executors *de son tort.*

In Parker v. Kett, 12 Modern 466, Holt, C. J., said (p. 471):

"And the reason of the law in other cases agrees with this; as an executor *de son tort*, who is but an executor *de facto*, if he does lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as, if he pay just and honest debts the rightful executor shall not avoid that payment; and yet it is an act done by one that has no right. It is true he is not quit against the rightful executor, but he shall maintain trover against him; but what shall he recover in damages? Only for so much as he has misapplied; and all that he has well applied shall be abated in damages. * * * If executor *de son tort* gets 300 l. of the testator's goods, and pays it duly to a just creditor, there the lawful executor, in my opinion, shall not even maintain trover against the wrongful executor, because it is a good payment and no prejudice to the executor."

And in Whitehall v. Squire, Carthew 104, Holt, C. J., again.

"Held it for law that where trover is brought by a rightful executor against an executor *de son tort*, he cannot plead payment of debts, etc., to the value, etc., or that he hath given the goods, etc., in satisfaction of the debts, because no man ought to obtrude himself upon the office of another; nevertheless, upon the general issue pleaded, such payments shall be recouped in damages, as where the disseisor hath paid the chief rent, etc., that shall be recouped to him in the damages in assise, brought against him by the disseisee."

To the same effect:

Hopple v. Higbee, 23 N. J. L. 339.

Buller's Nisi Prius [Ed. 1817] 48.

Mountford v. Gibson, 4 East. 441.

Mr. Sedgwick, in his work on Damages (side p. 428), quotes from Dyer, 2*b*, as follows:

"If a man disseize me of land, out of which a rent charge is issuant which has been in arrear for several years, and the disseisor pay it, if the disseisee recover in an assize, the rent that the disseisor has paid shall be recouped in damages."

For the application of a like principle, see

Taylor v. Henniker, 12 Ad. & Ell. 488.
Butts v. Edwards, 2 Denio, 164.

In Mayo v. The City of Springfield, 138 Mass. 70, an action against the city for unlawfully depositing earth upon the plaintiff's lot, the city was allowed to show, in mitigation of damages, benefits accrued to the plaintiff from filling up his lot.

These authorities leave no room to doubt that if Knox county were to sue collector Winterbottom for the misfeasance complained of by this plaintiff, he would be allowed to show, in mitigation of damages, that for every dollar for which he had given discharges to the taxpayers, he had received from them, and turned into the county treasury, an equal amount of the county's obligations, and to this extent had reduced her indebtedness, and that the county could recover, at most, nominal damages.

Again, granting that the county might sue if she chose, yet, inasmuch as she has not been injured by the action of the collector, why should she be forced into the litigation? If the party really injured is willing to assume the risk and expense of suing, why not permit him to proceed? So long as the county interposes no objection, and it does not appear by plea or otherwise that

she is taking any steps, is there any justice in permitting the tort-feasor and his sureties to defeat the action of the only person who has suffered substantial injury, on this ground? It may be said that the county can yet sue, and thus the defendants may be subjected to two actions for the same thing. Suppose this to be true, yet, unless the collector has been guilty of some wrong, there can be no recovery against him, and his prosecutors will have the costs to pay—the penalty which our law deems, for all cases, the sufficient preventive of unwarranted litigation; and if he was guilty, though there might be two judgments there could be but one satisfaction. But in the worst aspect of this case, it is quite as much of a hardship to the county to be called on to prosecute a suit in which she has no real interest as to the defendants to defend a double litigation.

V.

The petition is not uncertain or indefinite. Particularity in pleading is not required where great prolixity would be the result, as would be the case if the plaintiff had attempted to set forth the names of all the persons whose taxes were unlawfully paid in warrants and the amounts of the taxes thus paid.

Stephen on Pleading *p. 355.

But if it were uncertain, this defect could not be reached by demurrer. A motion to make more definite is the proper remedy.

R. S. 1879, sec. 3529.

Bliss on Code Pleading [2 Ed.] sec. 425*a*.

Uncertainty, or indefiniteness, is not one of the grounds for which a demurrer will lie, under the Missouri Practice Act.

R. S. 1879, sec. 3515.

Respectfully submitted,

T. K. SKINKER,

Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 6 1887
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, WHO SUES AT THE RELATION AND TO THE USE OF GEORGE W. HARSHMAN,
Plaintiff in Error.

vs.

JNO. WINTERBOTTOM, PHILIP B LINVILLE, *et al.*
Defendants in Error.

No. 8.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR.

JOHN W. DRYDEN
Attorneys for Defendants

Pierce Bros., Law Printers, 519 Pine St., St. Louis, Mo.

she is taking any steps, is there any justice in permitting the tort-feasor and his sureties to defeat the action of the only person who has suffered substantial injury, on this ground? It may be said that the county can yet sue, and thus the defendants may be subjected to two actions for the same thing. Suppose this to be true, yet, unless the collector has been guilty of some wrong, there can be no recovery against him, and his prosecutors will have the costs to pay—the penalty which our law deems, for all cases, the sufficient preventive of unwarranted litigation; and if he was guilty, though there might be two judgments there could be but one satisfaction. But in the worst aspect of this case, it is quite as much of a hardship to the county to be called on to prosecute a suit in which she has no real interest as to the defendants to defend a double litigation.

V.

The petition is not uncertain or indefinite. Particularity in pleading is not required where great prolixity would be the result, as would be the case if the plaintiff had attempted to set forth the names of all the persons whose taxes were unlawfully paid in warrants and the amounts of the taxes thus paid.

Stephen on Pleading *p. 355.

But if it were uncertain, this defect could not be reached by demurrer. A motion to make more definite is the proper remedy.

R. S. 1879, sec. 3529.

Bliss on Code Pleading [2 Ed.] sec. 425*a*.

Uncertainty, or indefiniteness, is not one of the grounds for which a demurrer will lie, under the Missouri Practice Act.

R. S. 1879, sec. 3515.

Respectfully submitted,

T. K. SKINKER,

Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 6 1887

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, WHO SUES AT THE RELATION AND TO THE USE OF GEORGE W. HARSHMAN, *Plaintiff in Error.*

vs.

JNO. WINTERBOTTOM, PHILIP B LINVILLE, *et al.* *Defendants in Error.*

No. 8.

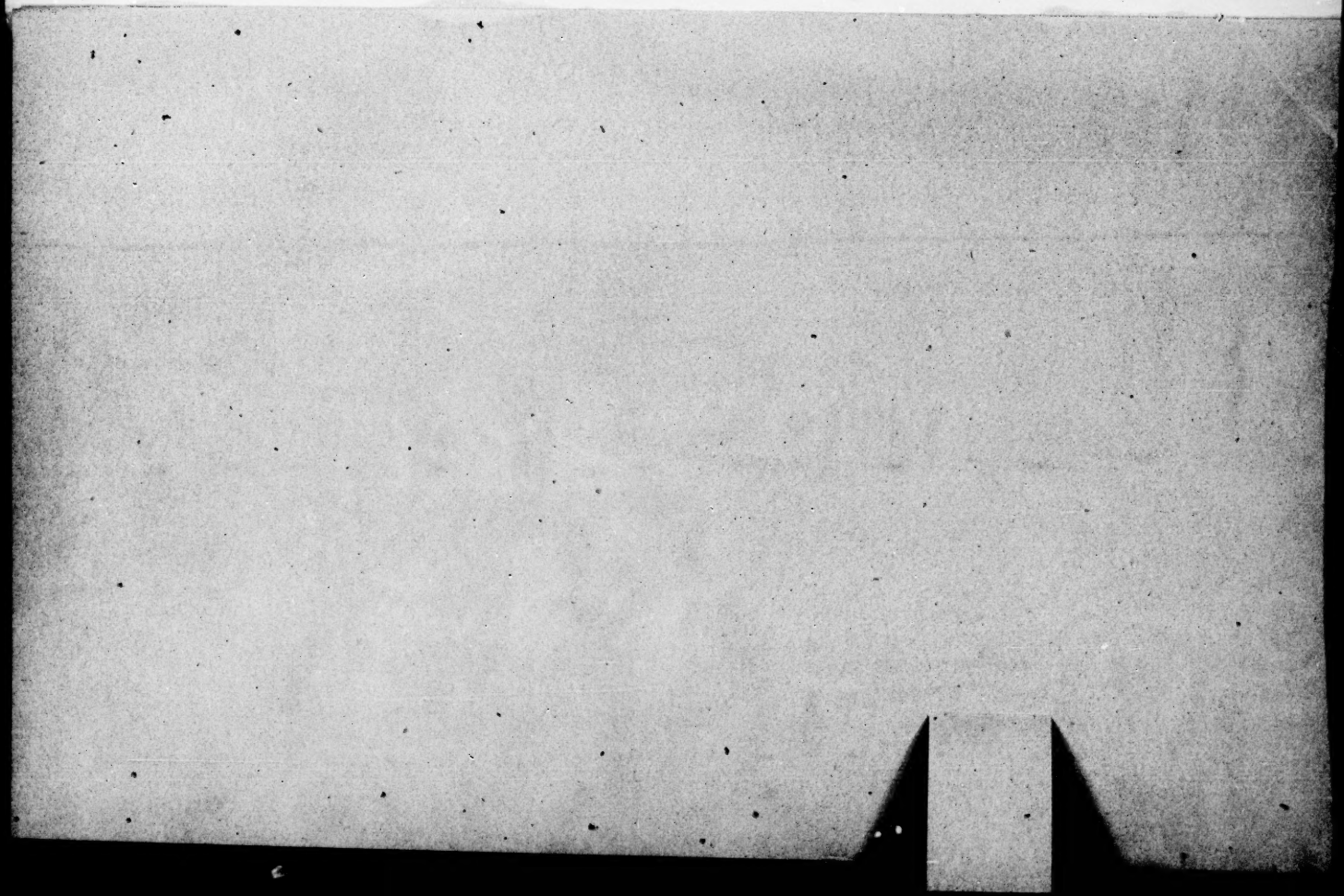
In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR.

JOHN W. DRYDEN

Attorneys for Defendants in Error.

Pierce Bros., Law Printers, 519 Pine St., St. Louis, Mo.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, WHO SUES AT THE RELATION AND TO THE USE OF GEORGE W. HARSHMAN, *Plaintiff in Error.*

vs.

JNO. WINTERBOTTOM, PHILIP B LINVILLE, *et al.* *Defendants in Error.*

No. 8.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This was an action at law against the collector of Knox County, Missouri, and the sureties upon his official bond, for damages for alleged breaches of the bond. It was brought in the name of the State at the relation of Harshman, who alleged in his petition that he was a creditor of Knox County,

holding certain of its warrants, and that, by certain wrongful acts of the collector, the county taxes were not collected and paid into the treasury, and that in consequence he was not able to get payment of his warrants from the county.

There was a demurrer to the petition, which was sustained by the lower court, and judgment accordingly for the defendants. And to reverse that judgment, the plaintiff has brought the case here.

As the case turns wholly upon the sufficiency of the petition, we will state briefly the substance of its averments. They were these:—

In December, 1878, the defendant Winterbottom, having been chosen collector, gave bond to the state with the other defendants as his sureties, in the penal sum of $100,000. The bond was conditioned, "that said Winterbottom should faithfully and punctually *collect, and pay over, all state, county and other revenue* for two years next ensuing the first day of March, 1879, and should in all things faithfully perform all the duties of the said office of collector according to law." (Rec. p. 4.)

In the year before this—1877—relator had recovered in the court below two judgments against Knox County, upon bonds of the county issued to the Missouri & Mississippi R. R. Co. Of these, one was for $3,258.15, and the other was for $6,764.44. By the charter of said railroad, a special tax of one-twentieth of one per cent. per annum only was provided for, and this being insufficient to pay the judgments in full, relator by mandamus required the County Court to issue him warrants on the ordinary revenue funds of the county for the unpaid balance thereof. This was done in March, 1879, relator receiving two warrants, which on March, 18, 1879, he presented to the county treasurer for payment. There being no money in the treasury to pay them, the treasurer so certified on the back of each, and entered them in his register, as required by section 5,370 of the Rev. Statutes of Missouri of 1879. These warrants were so registered before any other warrants which were outstanding between

March 18, 1879 and March 1, 1881, and were,—it was averred,—entitled to be paid first out of the county revenues, and would have been paid in full, if the county taxes had been collected and paid into the county treasury as required by law (p. 4, printed Record).

The ordinary revenue of Knox County consisted of an annual tax levy of fifty cents on the $100 of the assessed value of property in the county; and this, as levied for the years 1879 and 1880, if it had been collected, would have produced for each year about $13,500; or, for the two years, $27,000.

By law, it was the duty of the collector to collect taxes in money, except where county warrants were presented to him by a holder thereof, in payment of county taxes existing against such holder; and by law, no warrant could be made payable to bearer, and if so payable, would be void; and no one could be the holder except the person named therein, as payee, or his assignee by an assignment thereof in full. (Printed Rec., p. 4, bot., and p. 5, top.)

Winterbottom, in disregard of his duty as collector, and with the wrongful intent to prevent money coming into the county treasury, and to prevent Harshman from receiving from the county any payment on account of his warrants, wrongfully received from sundry persons, in payment of county taxes, county warrants, which were either payable to bearer, or were not payable to them, said persons, and were not assigned to them by assignments in full, and gave them full acquittances for all such taxes due from them; and so, from March 18th, 1879, to March 1st, 1881, he collected all the county taxes in such warrants, and gave all the tax-payers of the county full acquittances, without payment by them of any money to him. During said years 1879 and 1880, he made statements to the clerk of the County Court of taxes so collected by him, and delivered to the treasurer the warrants he had so received; and he and the treasurer, at various times in those years, made settlements of their official accounts with the County Court, and the treasurer exhibited to the court

and filed all the warrants so received by the collector; and the court approved their settlements and the acts of the collector in receiving said warrants in payment of taxes as aforesaid; and ratified and confirmed the release and discharge of said tax-payers from payment of their taxes as aforesaid, so that the same could not again be demanded of them. (Printed Rec., pp. 5 and 6.)

By said means, Winterbottom had wrongfully prevented any money from coming into the treasury; and, in consequence, Harshman had been unable to obtain payment of his warrants. All Winterbottom's said acts—it was further averred—were done with the unlawful and fraudulent purpose of defeating the collection and payment of Harshman's warrants, and did defeat such collection and payment.

The grounds of the demurrer to this petition were:

1. That it did not state facts sufficient to constitute a cause of action.

2. That, on the facts stated, defendants were not answerable in any action at law brought upon their bond by plaintiff, at the relation of Harshman.

3. That the wrongs complained of in it were wrongs done to Knox County, for which it had the exclusive right to sue at law, and that it was not made plaintiff in any way.

4. That, from the facts stated therein, the law did not imply damage to Harshman; and that no special damage to him was shown therein, and hence no cause of action in his favor shown.

5. That Harshman had neither legal nor equitable title to sue—no legal title, because the wrongful acts complained of are wrongs to the county which an action by it would redress; no equitable title, because it did not appear that the county had been requested to sue for the delinquencies complained of, or had refused so to do.

The following are, in substance, the statutory provisions

of Missouri relating to the levy and collection of county taxes, the issuing and payment of warrants, and the auditing of claims and the disbursement of county revenue, under the direction of the county courts.

There can be levied for county purposes, annually, in counties like Knox, taxes, in the aggregate not above fifty cents on the hundred dollars valuation. (Const. 1875, Art. X, Sec. 11.) The county taxes, together with taxes for state and school purposes, are extended and entered by the county clerk upon the tax book, annually made by the county assessor, which, after being corrected and adjusted, is, at a time not later than ninety days from February 20th, delivered to the county collector. (2 Rev. Stats. Mo. for 1879; §§ 6718, 6722, 6723 and 6744.) The collector, upon receipt of the tax book, with the county taxes stated therein, receipts for it to the county clerk, and by the latter is charged with the whole amount of the taxes therein. (*Id.* §6744.) The collector is required to notify the tax-payers of the county when and where he will meet them to receive payment of their taxes, and to attend and receive them accordingly. (*Id.* §§ 6748, 6749 and 6753.) He is given power to seize and sell the goods of tax-payers not paying, and so compel payment. (*Id.* §6754.) Such taxes as he cannot collect he puts on a delinquent list which, on the first Monday of March next thereafter, he returns to the county court, under his oath. At the same time, he makes his settlement with the court of all moneys received by him, and is credited by the court with the amount of all such taxes properly returned delinquent upon his said list. (*Id.* §§ 6770 and 6772.) Such settlement is required to be entered of record by the court, and so as to show the amount *due the state and county*, respectively. (*Id.* § 6775.)

On the 5th of every month, the collector must file with the county clerk a statement of all state, *county* and other taxes collected by him; and, on the 15th of the month, *pay the same* into the state and *county* treasuries, respectively. (*Id.* §§ 6780 and 6822.) If he fails so to pay in such taxes, he

forfeits his commissions, and a penalty of ten per cent.; and it is *the duty of the prosecuting attorney of the county to proceed, in thirty days, to collect them from him by suit on his official bond.* (*Id.* §6781.) His services for collecting taxes are paid by commissions upon what he collects, to be retained out of the state and county taxes so collected, and to be credited to him in his settlement. (*Id.* § 6785, pars. I., XII. and XIII.)

In case of default by the collector in the paying into the county treasury, at the times required by law, taxes due the county collected by him, he and his securities become liable to a penalty of ten per cent. per month of the amount he so fails to pay; and a special and summary remedy to recover all sums so due from him to the county, by motion for judgment in the Circuit Court, to be *prosecuted in the name of the county*, is given. (*Id.* §6855.)

The power to audit and settle all accounts against the county, and to order the payment out of the county treasury of money found due by the county thereon, is vested in the County Court (*Id.* § 5,388), which also has the control and management of the property of the county, and is required in settlements with the treasurer to ascertain the amount of *balances* and *funds*, in his hands, *and to what particular fund it appertains* (1 R. S. § 1,199). And, when the court ascertains any sum of money to be due from the county, it is required to order its clerk to issue a warrant therefor in the following form:

"Treasurer of the county of ; pay to dollars out of any money in the treasury *appropriated* for (express the *particular fund* as the case may require). Given at the court house this day of 18 ; by order of the County Court. A. B. *President.*"

(2 R. S. § 5,394). Warrants are assignable only by assignments written out in full, and no blank indorsement is of any effect to transfer them (*Id.* § 5,397). Upon presentation of them for payment, if there is no money in the treasury for that purpose, the treasurer must so certify on the back of

them (*Id.* § 5,396). He also must keep a register of them in a book, giving their number, dates and amounts, and when presented for payment, and all warrants so presented are to be paid *out of the funds mentioned in such warrants*, and in the order in which they shall be presented for payment (Id. § 5,370). And the treasurer may not refuse to pay any warrant legally drawn upon him and presented because warrants of prior presentation have not been paid, when there is money in the treasury, *belonging to the fund drawn upon*, sufficient to pay such prior warrants and the one so presented, but must, as he receives money *belonging to the fund so drawn upon*, set the same apart for the payment of warrants previously presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present them, *after funds shall have accrued in the treasury*, for their payment. (*Id.* § 5,371.) By one section of the statute, the collector is required to receive all county warrants presented by the legal holder in payment of any county revenue existing against such holder (*Id.* § 5,408), and by another section, all state and county taxes are to be paid in coin or U. S. legal tenders, national bank notes or auditor's warrants, provided that county warrants may be received in payment of county taxes. (*Id.* § 6,750.)

BRIEF.

The demurrer was properly sustained. The petition does not state facts sufficient to constitute a cause of action in favor of relator, Harshman.

I.

The action is one for breach of duty by a public officer, for which he and his sureties are to be held responsible. To maintain such an action, it is necessary to show that the particular duty neglected, or ill performed, was one which the officer owed directly to the plaintiff. It is not enough that plaintiff may have an indirect interest in the performance of the duty. It must be owing to *him*.

Harrington v. Ward, 9 Mass. 251.
State *ex rel.* Trav. Ins. Co. v. Harris, *et al.* 89 Ind. 363,
Dehn v. Heckman, *et al.*, 12 Oh. St. 183.
Ware v. Brown, 2 Bond, 267.
Terrell v. Andrew County, *et al.*, 44 Mo. 313.
State use Lovell v. Todd, 57 Mo. 218.
Kahl v. Love, 37 N. J. (Law), 7, 8, 9 and 10.
Strong v. Campbell, 11 Barb. 135.
Cooley on Torts., pp. 389, 394 note 1.
Murfree on Official Bonds, Sec. 468.
(S. P.) Fish v. Kelly, 17 C. B. (N. S.) 194.
(S. P.) Savings Bank v. Ward, 100 U. S. 202.

If a sheriff has an execution against A. it is very plain that he owes to B., who is not a party to the execution, the duty of not levying on his goods to satisfy the debt of A., and if, in violation of that duty, he does levy on B.'s goods and sells them, then of course B. has a right of action for that wrong. So if a tax collector has a tax bill against C., he owes to D. the duty not to levy on his goods to make the tax which C owes. And if, unmindful of that duty, he does levy on D.'s

property for C.'s taxes, clearly D. can sue him for the damages sustained by him.

In all cases like these—illustrations of which will be found in two of the cases cited in the brief of relator, to-wit: State vs. Moore, 19 Mo. 372, and State vs. Shacklett, 37 Mo. 284—it is very plain that there are such direct obligations of duty to the plaintiffs as give them rights of action for the injuries sustained by them. And one can hardly imagine to whom else than B. and D., in the cases supposed, the duty would be owing. Certainly, at any rate, no one would think it was owing to creditors of, or sureties for B. and D., no matter how much the injuries sustained by the latter by the wrongful levies might cripple them, and so prevent them from paying their debts owing to said creditors, or for which said sureties might be bound.

But the petition in this case does not show the breach of any duty owing by the collector to the relator. It does not appear that Winterbottom owed to Harshman the duty of collecting the county revenue in money and paying it into the county treasury. The only breach of duty alleged is the collection of the taxes in void warrants, or in warrants not belonging to the persons from whom the collector received them. This is equivalent to an allegation that the collector failed to collect the taxes at all. For to collect only in void warrants, or in warrants not owned by the tax payers producing them, is the same as no collection. But there was no relationship, or privity of contract, between Harshman and Winterbottom which bound the latter in any obligation of duty to the former to collect the taxes of Knox county. They were not due to him. They were not his property. If collected they could not have been paid to him. And if paid to him, such payment would have been wrongful, and no discharge of the collector's duty.

The most that can be said is that relator had an indirect interest in the performance by the collector of a duty that he owed to another. He was a creditor of the county, and as such, interested in the collector's doing his duty to the county

properly. But that did not make that duty one owing to him at all. It did not make it a duty in which he had a direct and special interest," within the meaning of Judge Cooley's opinion in Raynesford vs. Phelps, 43 Mich. 342, or such as existed in the several other cases cited in relator's brief. On the contrary, it only gave to him a secondary and indirect interest in the discharge by Winterbotton of his duty to Knox county, and brings his case clearly within the principle of the several cases in Massachusetts, Ohio, Missouri, Indiana and New Jersey cited by us above, in which it was held that the plaintiffs could not recover. The same principle was recognized and applied by this court in its opinion in the case of Savings Bank vs. Ward, 100 U. S. 202, where also some of the cases so cited by us were reviewed and approved. To the facts of those cases, and the reasoning of the courts by which they were decided, we particularly commend the attention of the court.

II.

The duty of collecting the county taxes was one which Winterbottom owed directly to Knox County, and to it alone. The taxes were the property of the county, and of no one else.

2 Rev. Stats. Mo. 1879. Secs. 6718, 6722, 6723 and 6744.

Davis v. Bader, 54 Mo. 168.

For them Winterbottom was bound to account to the county, and to no one else.

2 Rev. Stats. Mo. 1879, Secs. 6770, 6772, 6775 and 6780.

For the purpose of collecting them he was the agent of the county, and of no one else.

Logan v. Barton County, 63 Mo. 341.

By law he was bound to pay them to the county's agent, the Treasurer, and to no one else.

2 R. S. 1879, Secs. 6780, 6822, 6855.

And for a failure to pay them to the Treasurer he was liable to heavy penalties, a right to recover which, as also the unpaid taxes, from him *and his sureties*, was specially given by statute to the county, and to no one else.

2 R. S. 1879, Secs. 6781 and 6855.

The county, then, as the one to whom the duty was owing, and as the owner of the taxes charged to have been not collected by Winterbottom, was the party whose legal right was affected by his default, and as such was the only party entitled to an action at law against him therefor. At law the action must be by the party whose legal right has been affected.

1 Chitty's Pldg., p. 1.

People v. Ingersoll et. al., 58 N. Y. 1.

Moreover, independent of any light derived from the rules of pleading and procedure, the statute in direct terms points out the county as the party in whose name suits against the collector, for failure to collect and pay over the county revenue, shall be brought.

"Proceedings under this section shall be *in the name of the* state or *county*, as the case may be" is the language of the statute.

2 Rev. Stat. 1879, Secs. 6781 and 6855.

And this we submit must be held to be exclusive of any right in any one else to sue for such default. For otherwise the collector would be subject to more than one suit for the same matter.

III.

The fact that Harshman was a warrant creditor, and that his warrants were prior in date of presentation to those of others, did not create any such relation between him and the collector, or give him such an interest in the taxes, as would

entitle him to an action against him for breach of his duty in failing to collect them. For:—

1. A creditor has no such interest in debts due by others to his debtor, or in the debtor himself, as that he can maintain an action for a wrong done to his debtor, by reason of which the debtor is disabled from paying his debt to him.

State use Lovell v. Todd, 57 Mo. 218.
King of Spain v. Oliver, 1 Pet. C. C. 276, 288.
Dale et al. v. Grant et. al., 34 N. J., (Law) 148.
Anthony v. Slaid. 11 Met. 290, (Shaw C. J.)
Cunningham v. Brown, 18 Vt. 126, (Redfield J.)
Rockingham M. F. Ins. Co. v. Boscher, 39 Me. 253.
Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R., 25 Conn. 265.

The same principle applies (but with far greater force) as that which governs in suits of stockholders against directors and other officers of corporations. As to them, it is well settled that no stockholder can recover damages in an action at law against directors or officers for loss of the value of his stock by reason of their mismanagement of the corporate affairs, but that he must look for his redress to the results of a suit against them by the corporation itself.

Smith v. Hurd, 12 Met. 383, (Shaw C. J.)
Winter v. Baker, 34 How. Prac., 183.
Smith v. Poor, 40 Me. 415.
Hersey v. Veazie, 24 Me. 9.
R. R. Co. v. R. R. Co., 54 Me. 181.
Brown v. Van Dyke, 4 Halsted, (N. J.) 795.
Abbott et al. v. Merriam et al., 8 Cush. 590.
Memphis v. Dean, 8 Wall, 73.
Gardner v. Boston Theatre Co., 104 Mass. 378.
Greaves v. Gouge, 69 N. Y. 156.
Wilkie v. Roch. & St. L. R. R. et al., 19 N. Y. Sup. R. 242.
Allen v. Curtis, 26 Conn. 456.
Garner v. Pollard, 10 Bosw. 690.
Butler v. Kent, 19 Johns, 228

The same principle has also in like manner been applied to suits against delinquent officers of corporations by creditors of the corporations, who, it was held also, could not recover.

Winter v. Baker, 34 How Prac., 183.

2. The injury, if any, sustained by him was only the indirect and remote result of the collector's wrong doing, and not the direct and proximate result of it. The non-collection of the taxes was a cause of the county not having money in its treasury to pay its debts, and the county's not paying its debts was the cause of relator's injury. But it was the latter which was the proximate cause of that injury, and not the former; for, if the county had received money from other sources than the uncollected taxes, as from fines, forfeitures, sales of property, or by borrowing, and had paid relator, then, notwithstanding that the collector had failed in his duty, relator would not have suffered. Or if, on the other hand, the collector had properly collected and paid the taxes into the treasury, but yet the Treasurer had refused to pay relator's warrants, then the relator would have been just as much harmed, as he now claims to be through the collector's default. So then, though it be conceded that he has suffered by reason of the collector's misfeasance of his duty to the county, yet it is apparent that such suffering is, in effect, at least, one degree removed from the original effect of that misfeasance. And for such secondary effects of wrongs the law affords no remedy. *Causa proxima non remota spectatur* is the maxim of the law. If it went further than the first effect, then there would be no end of the litigations which might spring out of a single wrong. For with equal propriety it might seek to repair injuries resulting in the third, fourth, fifth or any other degree removed from the first. It would not stop with redressing Creditor Harshman's injury, but would pass on to make good the losses accruing to his creditors, and to the creditors of his creditors, and so on and on infinitely.

Dale et al. v. Grant et al., 34 N. J., (Law) p. 148.

Kahl v. Love, 37 N. J. (Law) pp. 7, 8, 9 and 10.
State use Lovell v. Todd, 57 Mo. 218.
Smith v. Hurd et al., 12 Met. 387, (Shaw C. J.)
Cooley on Torts, pp. 68 and 69.

As was said by Shaw, C. J., in Smith vs. Hurd, *supra* : "Thousands of instances occur in which one sustains consequential and incidental damage from the misconduct of another without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage for which the law, from the nature of the case, can afford no direct remedy."

And as again was said by Beasley, C. J., in Kahl vs. Love, *supra*, quoted by this Court in its opinion in Savings Bank vs. Ward, 100 U. S., 202: "The limit of the doctrine relating to actionable negligence is, that the person occasioning the loss must owe a duty arising from contract or otherwise to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments, or the transaction of business, is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men could be followed down the chain of results to the final effect."

3. It does not necessarily follow that, if the collector had collected all the taxes in money and paid them into the county treasury, relator would have been entitled to any of them. After so coming into the treasury they would have been subject to appropriation by the County Court, in its discretion, to meet the various necessities of the county, such as the support of the poor, the making and repair of roads, the salaries of officers, the expenses of the administration of justice, and other current and uncertain expenses. The discretionary power thus to appropriate the ordinary revenue, is plainly

vested in the County Court by statute—(Rev. Stats. 1879, §§ 1199, 5370, 5371, 5388 and 5394)—and has been recognized by this Court in Findley vs. McAllister, 113 U. S., 109. And it cannot be controlled, or superceded, by any other court.

East St. Louis v. U. S., *ex rel.*, Zebley, 110 U. S., 324.

Clay Co. v. McAleer *et al.*, 115 U. S., 617.

Relator's warrants—assuming them to have been made in conformity to the law (Rev. Stats., §5394)—did not entitle him to payment in priority of other warrants, except those drawn upon the "*particular fund*" appropriated for such purposes, and mentioned in the warrants as the fund out of which they were to be paid. (Revised Statutes, §§ 5394, 5370 and 5371.) And how much of the $27,000 of taxes not collected by Winterbottom in 1879 and 1880, if any, would have been so appropriated to the particular fund mentioned in relator's warrants cannot, of course, be known. Hence, even if it were conceded—as it is not—that, if the taxes not collected would have been appropriated by the county to the payment of the "particular fund mentioned in his warrants," he would have had such a direct and special interest in them as would have entitled him to sue the collector for not collecting them, yet his case fails because it is not apparent that they would have been so appropriated.

And the fact that relator's right was only to an uncertain share of a general tax, and that, too, liable to be appropriated to other uses than his, distinguishes this case widely from those of Amy vs. Supervisors, 11 Wall, 136, and Findley vs. McAllister, 113 U. S. 104, relied on by him. In both those cases the taxes which had been ordered levied, and the failure to levy which, or the obstruction in the collecting of which, was the basis of the complaints of the respective plaintiffs therein, were *special* taxes required alone for the purpose of paying the judgments of the plaintiffs, and in which neither the counties nor any one else than those plaintiffs had any interest whatever. And those cases therefore do not apply.

4. Relator, by virtue neither of his original judgment claim, nor of his warrants taken in payment of it, had any lien on, or right in, the county revenue, or any particular part thereof. He was only a general creditor holding the written orders of one officer of the county upon another officer to pay him so much money out of a certain fund. These orders or warrants were simply choses in action of the county, enforceable against it in the same way as all like choses in action. They gave him no right to demand any part of the revenue while in the hands of the collector, or the tax payers, or to compel the payment of such revenue to him, except when in the hands of the treasurer. His position, and his relation to the taxes to be collected, were widely different from those of the plaintiffs in the case of Amy vs. Supervisors, and Findley vs. McAllister. They were judgment creditors, and the taxes there involved were special taxes levied to pay their judgments only, and the collecting of which was only the enforcement of the process of the courts issued to execute those judgments. In relator's case the judgment was out of the way, and he had no process of court to be enforced, but stood simply in the attitude of an ordinary warrant creditor. The taxes were general, not special, and he had no more right to or interest in them than other creditors of the county.

5. If relator, as one warrant creditor, can sue the collector and his sureties for his share of the $27,000 of taxes not collected, it is plain that on like principles every other warrant creditor, or for that matter every creditor of every kind can maintain an action for his share also. Possibly those whose warrants were of prior presentation would take precedence in point of satisfaction over those which stood later on the registration list. But none the less, in the order of their registration at least, they would all be entitled to sue, until the entire $27,000 had been recovered. And so, not only would the defendants be harrassed with a great number of actions for the same default, but the county itself would be deprived

of all control of its own affairs. Or, if it be held that the county by virtue of the express provisions of the statute (Rev. Stats. 1879, § 6,855), could also sue, as would seem undeniable, then the collector and his sureties would be liable to pay twice for his defection. Such a state of affairs would be exceedingly mischievous and unjust, and utterly subversive of all order in the administration of the county's affairs.

Abbott v. Merriam, *et al.*, 8 Cush. 590.
Smith v. Hurd, 12 Met. 383.

Moreover, it would involve splitting up one cause of action for the $27,000 of taxes into as many parts as there were creditors. A cause of action is an entirety, and may not be divided.

See Chitty on Pldg., (9th Am. Ed.) * p. 199, note 5.
Smith v. Jones, 15 Johns, 229.
Willard v. Sperry, 16 Johns. 121.
Colwin v. Corwin, 15 Wend. 557.
Stevens v. Lockwood, 13 *Id.* 644.
Flaherty v. Taylor, 35 Mo. 451.

IV.

Relator's injury, if any there were under the facts shown, was only one common to all the members of the community. The petition shows no special damage to him. He still has his warrants, which bear interest at six per cent. per annum, and *prima facie* are worth par. It does not appear that they have depreciated in value. Moreover, any hurt suffered by him could be cured by an action by the county, whose creditor he is, and under whom he claims. Where such a remedy exists there is no damage, either special or general.

Smith v. Hurd, 12 Met. 387.
Garner v. Pollard, 10 Bosw. 690.
Butler v. Kent, 19 Johns. 228.

If the county, on demand made, should refuse to sue the collector, relator would find relief in a suit in equity.

Memphis v. Dean, 8 Wall, 73.

V.

That the collector gave acquittances to the tax-payers, and made settlements of his accounts with the County Court as if he had collected the taxes, and exhibited the void warrants to that Court, and that it approved his settlements and his release of the tax-payers, does not give relator a standing, if he otherwise has none. None of those things would be any bar to an action by the county against the collector and his sureties for the full amount he had failed to collect, or had collected only in void warrants. The County Court, like the collector, is only an agent of the county with limited powers. Its settlements with him have none of the force of judgments and anything due from him may be collected by the county, notwithstanding such settlements. This is well settled by the Supreme Court of Missouri, by many decisions.

State v. Roberts, 60 Mo. 402.
Marion Co. v. Phillips, 45 Mo. 79.
Owens v. Andrew Co., 49 Mo. 372.
State to use, etc., v. Roberts, 62 Mo. 389.
Saline Co. v. Wilson, 61 Mo 237.

The County Court had no more power to accept from the collector, in discharge of his duty to the county, void warrants than it would have had to accept Confederate notes, or counterfeit money. And its action in so doing would be as much a nullity in the one case as in the other. And the county, notwithstanding such action, would have the right to sue and recover of the collector all the taxes for which he had thus turned in counterfeit money, or void warrants. The county court as an agent of limited powers could not give away debts due to it, or release them without a consideration.

Nor is there any foundation for the argument made on relator's behalf, that the county has suffered no substantial injury by the collector's action, for the alleged reason that it has gotten a benefit equal in amount to the taxes not collected,

in the cancellation of a like amount of its obligations, to-wit: warrants received by the collector, and that, therefore, it has no ground of complaint or right to sue.

The argument might have force if we could assume that the warrants cancelled were indeed valid obligations of the county, and had been taken from persons having title to them: that is, their holders. And, except upon such assumption, it is obvious that it can count for nothing. For unless the obligations were binding on the county, clearly the cancellation of them would be useless, and the taxes released in exchange for them would be simply thrown away; and unless they were taken up from the real holders, the destruction of them would in no wise relieve the county from liability to those who could show title to them. But, in fact, no such assumption is possible under the averments of the petition. The allegations there are,—and it is of the very esssence of relator's case that they should be so—that the warrants received by the collector either were not payable to the persons from whom they were received, and not duly assigned to them, and said persons were "not the legal holders of them," (Rec. p. 5), or that they were "payable to bearer." (Rec. p. 6) And the allegation also is that "no county warrant can be made payable to bearer, and any payable to bearer is null and void." (Rec. p. 5, top.) The argument thus is inconsistent with the petition, and a plain departure from it. If one stands, the other must fall. They cannot stand together. The county has derived no benefit from the matters averred in the petition, which would deprive it of a right to sue defendants, and so leave the way open for relator to sue, as he claims the right to do. Its taxes to the extent of $27,000 were given away for claims that it did not owe, and so were lost to it. For this loss it, and it only, is the party who can sue.

And even if it had derived a benefit, it would not lie in the mouth of the collector to set up that fact in answer to a suit against him by the county. He, when charged with direct disobedience of and non-compliance with the law, would

never be heard to say that such disobedience had worked no harm.

VI.

The averments of the petition, that the collection of the taxes by the collector in void warrants, &c., &c., was made with a fraudulent intent to prevent relator from obtaining payment of his warrants, are irrelevant. If the other allegations are not sufficient without them to show a cause of action in relator, they are not sufficient with them added. If the collector's so collecting worked a legal injury to relator, then he would be responsible to him for damages, no matter what his intent was. But if it did not work such legal injury, that is an injury for which an action would lie, then the fact that it was done by him with a bad intent would not make him any more liable.

An act which does not itself amount to a legal injury cannot be actionable because done with a bad intent.

Cooley on Torts, pp. 688–694.
Allen v. Curtis, 26 Conn. 462

If A. should sue B. for damages for failing to collect and pay over to C. $5000 of accounts, which C. had employed him (B.) to collect, and out of which, when collected, he (C.) had promised him (A.) to pay a note of $1,000 that he owed him, would he add anything to the strength of his case by averring that B.'s failure to collect the accounts for C. was made for the fraudulent purpose of preventing him from having the means to pay his note to A., and to prevent A. from so getting payment of his debt? We submit that he would not; also, that no more in one case than in the other would he have a cause of action.

VII.

The relator's case is wholly without a precedent to support

it. The very fact that it is so is strong evidence that it is not well grounded. There have been multitudes of instances of defalcations by collectors, treasurers and other officers of counties, cities, towns and states, whose duties bound them to collect, or preserve, the funds of their respective municipalities, and where such defalcations have, in a greater or less degree, prevented the payment to creditors of the municipalities of the debts due them. But yet there are no cases to be found in which actions have been brought by such creditors against the defaulting officers, or their sureties, to collect of them their unpaid debts, or damages for their non-payment. If any such right of action as the relator now claims in his favor existed in favor of such creditors, or had been thought by the suffering creditors, or their legal advisers, to exist, suits would have been brought, and have found their way to the higher courts. Yet none such appear. Nor are there other than a very few, if any, cases in which persons suffering indirect injuries from the neglect or wrongful acts of others have been held entitled to a right of action for such injuries. One such appears in the decisions of the Supreme Court of Missouri, and is cited by the relator in his brief. That is the case of County Court, &c., *ex rel* Jenks vs. Fassett, 65 Mo. 419. In that case a person who had purchased coal oil, which had been wrongfully branded as "approved" by the defendant as coal oil inspector, sued for damages caused by an explosion of the oil; and, although he was only a remote purchaser from the manufacturers in whose possession it was when inspected and branded, he was held entitled to recover. But it will be noted that in that case the statute gave a right of action upon the inspector's bond to "*any* person aggrieved by the acts or neglect of the inspector" (Gen. Stats. 1865, p. 436, § 7); and that the court rested its opinion wholly upon this statute, which it declared to be "very broad." But for the statute it would probably not have held that there was any right of action. It therefore is of no force as a precedent in favor of the allowance of damages for remote injuries. And if it were, yet the